Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. ~~79-1857~~

ALCOA STEAMSHIP COMPANY, INC. (a New York corporation),

Petitioner,

against

M/V NORDIC REGENT, her boilers, tackle, machinery and other appurtenances *in rem* and NORCROSS SHIPPING CO., INC. (a Liberian corporation), as her owner in *personam,*

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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N/V NORDIC REGENT, her boilers, tackle, machinery and other appurtenances *in rem* and NORCROSS SHIPPING CO., INC. (a Liberian corporation), as her owner *in personam,*

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the *en banc* decision of the United States Court of Appeals for the Second Circuit dated February 25, 1980, vacating the judgment and opinion of the panel on rehearing dated January 10, 1979 which, in turn, had reversed the judgment and opinion of the same panel dated August 31, 1978. The *en banc* decision affirmed the judgment of the United States District Court for the Southern District of New York dated January 17, 1978, dismissing this admiralty suit on *forum non conveniens* grounds.

Opinions Below

None of the opinions of the Court of Appeals in this case has been officially reported, although all have been unofficially reported in American Maritime Cases. The *en banc* slip opinion of the Court of Appeals for the Second Circuit dated February 25, 1980 (1980 AMC 309) is reproduced in Appendix B at page A-3.* The panel opinion dated January 10, 1979 (1979

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* A—refers to the appendix herein.

AMC 1) is reproduced at page A-45 and the panel opinion dated August 31, 1978 (1979 AMC 13) is reproduced at page A-63. The District Court opinion dated January 17, 1978 (453 F. Supp. 10) is reproduced at page A-73.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 25, 1980. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Under what circumstances, if any, may a U. S. citizen, having obtained personal jurisdiction over a defendant doing business in the district, be dismissed, on *forum non conveniens* grounds, from the federal court in the district in which it resides and has its principal place of business, and relegated to the courts of a foreign nation?

2. In considering a motion by a foreign defendant to dismiss, on *forum non conveniens* grounds, a suit brought by a resident U.S. plaintiff, may a court disregard the fact that the law of the alternative foreign forum would limit the American plaintiff's recovery to less than ten percent of its claim?

3. May American plaintiffs, resident in the United States, be dismissed out of United States courts and relegated to an only nominal remedy, on the basis of a freely "discretionary" assessment of mere "balance of convenience" factors, of a sort and weight necessarily found in most causes of action arising outside the United States?

Statutes Involved

Involved in this case are art. III § 2, cl. 1 (The "arising under" and Admiralty Clauses) and art. IV, § 2 cl. 1 (The Privileges and Immunities Clause) of the Constitution of the United States, and 46 U.S.C. § 183(a) (The Limitation of Shipowners' Liability Statute), which are printed in Appendix A.

Statement of the Case

a. The Facts

Petitioner Alcoa Steamship Company, Inc. (a New York corporation) now has, and has had since 1925 an office and principal place of business in New York City where all executive decisions are made and board meetings held.

Petitioner is in the business of transportation by sea of ore and other bulk cargoes. It often charters and operates the vessels required, and owns and operates a transfer-station ore pier at Point Tembladora, Port of Spain, Trinidad.

Among the vessels so used was the Liberian-flag M/V Nordic Regent, with predominantly Italian officers and crew, which Alcoa Steamship had chartered from Anglo Nordic Shipping Ltd., the disponent owner of the vessel. Anglo Nordic, which has offices in New York City, is the sole stockholder of and also the New York general agent for the registered owner, Norcross Shipping Co., Inc., a Liberian corporation. The charter with Anglo Nordic provides for service of process in New York and litigation of disputes in the United States District Court for the Southern District of New York.

On January 2, 1977, the Nordic Regent, pursuant to this charter, was bound for Point Tembladora, Trinidad. The Master of the Nordic Regent, approaching pilotage waters, radioed for a pilot, and was informed that one would come. However, when the pilot launch did not arrive immediately alongside the vessel, the Master—despite his unfamiliarity with the waters—inexplicably elected to forge ahead to Alcoa's Point Tembladora pier facility without pilot assistance. At about 2340 hours on January 2, 1977, the Nordic Regent collided with Alcoa's pier, causing approximately $8,000,000 damage.

b. Litigation History

On January 7, 1977, Alcoa Steamship brought suit in the United States District Court for the Southern District of New York *in rem* against the vessel and *in personam* against Norcross,

her owner, for the $8,000,000 damage, alleging that the Nordic Regent, a moving vessel, was at fault for having collided with the pier, a stationary object. Alcoa Steamship obtained *in personam* jurisdiction over Norcross by serving its general agent, Anglo Nordic. Later, Alcoa Steamship obtained *in rem* jurisdiction when the defendant filed a claim of owner and gave security in an amount equal to the value of the vessel to avoid her arrest in Texas.

On January 18, 1977, respondent-defendant herein, Norcross, commenced a limitation proceeding in Trinidad; the apparent effect of success in that foreign proceeding would be limitation to the amount of $570,000, or about eight percent of the present claim, see opinion of the Court below herein, *infra* at A-29.

Then, on February 4, 1977, defendant moved to dismiss the present action on *forum non conveniens* grounds. Almost a year later, on January 17, 1978, the United States District Court for the Southern District of New York granted the motion. Alcoa Steamship immediately appealed and the Second Circuit Court of Appeals affirmed the District Court's decision in a 2 to 1 opinion dated August 31, 1978. Upon rehearing, the same panel, in an opinion dated January 10, 1979, reversed itself and the District Court.

Upon further rehearing, this time *en banc*, the Court of Appeals again affirmed the judgment of the District Court (with two dissents*) in an opinion dated February 25, 1980—over three years after this action was brought.

Reasons for Granting the Writ

Introduction

The Court of Appeals for the Second Circuit has here taken

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* Judges Van Graafeiland and Oakes. Judge Waterman, who voted with the majority in the January 10, 1979 decision in favor of Alcoa Steamship, did not participate in the *en banc* decision.

two giant steps away from the law of *forum non conveniens* as hitherto understood.

First, it has plainly treated American citizenship and residence of plaintiffs as of no importance in shaping the decision whether to dismiss their suits out of their own national courts on *forum non conveniens* grounds. This casual treatment of citizens' rights of access to their own courts is an order-of-magnitude jump away from repeated statements and holdings of prior courts (including this Court), of all commentators—and even, unequivocally, of the Second Circuit Court of Appeals itself, as late as 1972, *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326, 1344 (1972).

Secondly, the Court of Appeals has held that the prospect of virtual defeat of recovery (by limitation to some eight cents on the dollar of the claim) in the forum to which plaintiff is remitted is wholly immaterial as a matter of law, though it is in truth the factor by far most plainly relevant to the practical justice of dismissal. This holding is not supported by *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932) (the only Supreme Court authority cited in support by the court below), is branded as contrary to "the interest of justice" by the rationale of *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964), and sharply departs from the 1975 position of the Second Circuit Court itself, *Fitzgerald* v. *Texaco, Inc.*, 521 F. 2d 448, 453 (1975), analyzed *infra*, p. 18.

These two steps mark this case as one that calls urgently for the attention of this Court.*

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* There are present in this case no factors at all of a kind or weight sufficient to justify such dealings either with American citizenship or with the commonsense practicalities of justice—much less with these two things together.

There is no suggestion of vexation, harassment or imposition, the prevention of which is the root reason of the *forum non conveniens* device, *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507 (1947), *see also Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518, 524 (1947) as to dismissal from plaintiff's home forum.

(Continued on following page)

1. This Court should (a) set guidelines as to when, if ever, a United States plaintiff may be denied the right of trial in the federal court in the district in which it is resident and (b) by so doing resolve a conflict among the circuits on this point.

a. The innovatory treatment of this question by the court below demonstrates the need for guidelines to be set by this Court.

The starting-point may be the late Alexander Bickel's classic piece, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q.

(Continued from previous page)

There is no showing or particularized allegation of serious inconvenience to the defendant, which has a place of business and an agent for receipt of process in the district of suit. Defendant has no ties with Trinidad and Tobago, where the suit will probably have to go if this dismissal stands. The cause of action is a normal one in maritime tort, with facts called "simple and straightforward" even by the court below.

There is no contractual arrangement for suit anywhere else, *cf. Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). On the contrary, the charter party between the plaintiff and defendant's sole stockholder provides for litigation of disputes in New York—something close to an admission that a New York forum is not "inconvenient," since many charterparty disputes might have involved just the sorts of insubstantial "inconvenience" alleged here.

The suggestion that defendant might bring in a Trinidad pilot or pilots' association as a third-party defendant (*see* 453 F. Supp. at 13) is hardly even colorable, since the act of the defendant's master in proceeding immediately without the pilot was a conscious and unjustified *novus actus interveniens*. Besides, no affirmative theory on which pilots' liability could be predicated is suggested by anything in the case.

In sum, this case involves no more difficulty than is sure to be suggestible as to most causes of action arising in a country other than the United States. If this holding is allowed to stand, American citizens may be dismissed out of their own courts in most such cases, for this one is in no way extraordinary.

12 (1949). In the world of which Bickel writes, only 31 years ago, dismissal of such a case as this would be inconceivable:

> [I]t is . . . not often crucial to determine whether a constitutional guarantee of access to the courts protects the American libellant from dismissal. For there are valid reasons why, *if discretion exists, it should be sharply restricted*. . . . And an American libellant after all pays taxes toward the support of the Federal courts and is therefore somewhat entitled, where a foreigner has no claim at all, to burden them with a not excessive measure of inconvenience. . . .
>
> There should be dismissal only when *flagrant injustice* would be done by allowing the suit to proceed. This would mean cases in which *all* factors of convenience point to the defendant's forum *and the libellant's only possible purpose to bring suit here was to harass defendant into an unfavorable settlement.*
>
> —35 CORNELL L.Q. 12, 44-45 (1949) (emphasis supplied)

Shortly before, Professor (now Justice) Robert Braucher, had written of *forum non conveniens:*

> But no court seems to have applied the doctrine to dismiss a suit brought by an American citizen in his own right; if the power exists, occasion for its application is apparently rare.
>
> —Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 921 (1947)

Also in 1947, Professor Edward L. Barrett, Jr.:

> The plaintiff may be denied the right to sue in the state where he resided at the time the cause of action arose *only* in the rare cases *when his suit is so obviously vexatious and oppressive to the defendant as to far outweigh the convenience of suit at home.*
>
> —Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIFORNIA L. REV. 380, 419 (1947) (emphasis supplied)

This Court has not thoroughly examined *forum non conveniens* since these articles appeared, just after *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947) and *Koster* v. *Lumbermens Mutual Co.*, 330 U. S. 518 (1947). Those decisions in no way support this dismissal, though *Gilbert*, which did not involve the present issues at all, was treated by the court below as the prime authority. Both decisions were uttered against the background (see the articles just cited) of *exceeding spareness* in dismissal of plaintiffs' home-forum actions; it is in this context that their generalities must be understood. In *Koster*, to be sure, a New York stockholder-plaintiff was dismissed to the more convenient Illinois forum, where the corporate headquarters were, but significant above all is the thoroughness with which the Court explores those extraordinary considerations deemed to justify the extraordinary exception, clearly seen as such. Moreover, the *Koster* dismissal was to have no more untoward result for the plaintiff than having to sue in another state.*

It is of high significance that Mr. Justice Frankfurter, who was of the *Koster* majority, just three years later, writing for the Court in *Swift & Co.* v. *Compania Colombiana del Caribe*, 339 U. S. 684 (1950), saw as *still altogether open* the general "abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens," 339 U. S. at 697. Something passing strange has happened on the way to the forum in just the last few years, if a decision such as the present one can be thought so much as arguably right.

In the case at bar, the Court of Appeals of the Second Circuit has utterly transformed *forum non conveniens* practice as to Americans' rights of access to their own federal courts, making it over into a field for broad and free "discretion" in the district courts—with (as this case surely illustrates) no pre-

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* Even so, Justices Black, Rutledge, Reed and Burton dissented, a fact which signals that even the *Koster* decision was at the very edge of the law.

sumption in favor of the American plaintiff suing at home.* The opinion below frankly bottoms its conclusion on a "trend," on a "dramatic *recent* evolution," on *"recent* cases" (in the state courts) that "favor a *liberal* application," on the swinging of a "pendulum," (A-18-A-20, emphasis supplied). But it is the proper responsibility of the Supreme Court of the United States to say whether the pendulum has in this case swung, as pendulums sometimes do, too far.

This recent "trend" importantly touches the privileges and immunities of American citizenship—whether in their fully constitutional sense or in their character as high national values. *Crandall* v. *Nevada*, 73 U. S. (6 Wall) 35 (1867); *Corfield* v. *Coryell*, 6 F. Cas. 546 (C. C. E. D. Pa. 1823) (No. 3,230) (4 Wash. C.C. 37). The ultimate constitutional issue—whether American citizens may *ever* be dismissed out of their own courts on *forum non conveniens* grounds—need not be reached. It is enough that this problem is in "the constitutional foothills," Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 31-32 (1957); *Cf. Kent* v. *Dulles*, 357 U. S. 116 (1958). Such a development as this ought not to take place without scrutiny by this Court. It cannot be left to the unexamined and unguided holdings of the several Courts of Appeal, much less to the *ad hoc* "discretion" of district judges, which is where the decision below puts it and leaves it.

As Circuit Judge Oakes said in his dissent in this case below (A-32):

> In 1949 the late Alexander Bickel referring to the "device" of forum non conveniens, said, "The device has been in use in admiralty in the United States for 150 years and more, and has never received an overhauling.

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* The extent and meaning of this transformation are established and illustrated by the Court of Appeal's decision in *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F. 2d 880 (1978), coupled with the use of that decision in that Court's *en banc* opinion herein. For the sake of clarity, petitioner has reserved discussion of this important matter until Point 2, *infra* pp. 12-15.

> It needs one pretty badly." . . . 35 Cornell L. Q. 12, 13 (1949).
>
> Such an overhauling is even more necessary today; it still has not occurred.

If an "overhaul" were needed in Bickel's day, clarification by this Court of this basic citizenship issue is the least that can be thought needed now.

b. The holding of the court below as to the citizenship issue conflicts with decisions of the Third, Fifth, and District of Columbia Circuits.

In *Mobil Tankers Co.* v. *Mene Grande Oil Co.*, 363 F. 2d 611 (3rd Cir.), *cert. denied*, 385 U. S. 945 (1966), the plaintiff, a Venezuelan corporation having its principal place of business in New York City, sued in federal court in Delaware for cargo and vessel damage arising out of a fire and explosion at an oil terminal which the defendant, a Delaware corporation, operated in Venezuela. Mobil, a New York corporation and parent of the plaintiff, intervened in the litigation as cargo owner. Venezuelan law concededly governed. The district court dismissed on *forum non conveniens* grounds, 236 F. Supp. 362, 368. The Third Circuit reversed, saying that even though the balance of conveniences favored the defendant, a U. S. citizen's election of a U. S. federal court "should not be disregarded in the absence of persuasive evidence that the retention of jurisdiction will result in *manifest injustice* to the respondent. . . . This is so even though the more convenient forum may be the foreign one. . . ." 363 F. 2d at 614 (emphasis supplied).

The same high standard prevails in the Fifth Circuit. In *Burt* v. *Isthmus Development Co.*, 218 F. 2d 353 (5th Cir.), *cert. denied*, 349 U. S. 922 (1955), a New York plaintiff brought a contract action against a Texas corporation in federal court in Texas. Mexican law governed, all the negotiations occurred in Mexico, performance was to be in Mexico, and all the defendant's witnesses were there. The district court dismissed on *forum non conveniens* grounds. The Fifth Circuit reversed, saying:

> It strikes us as being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong.
>
> —218 F. 2d at 357.

Finding it unnecessary in that case "to hold that no discretion exists in *any* such case to decline jurisdiction," referring to *Swift & Co.* v. *Compania Colombiana Del Caribe, S.A., supra,* the opinion went on to ". . . express the view that . . . courts should require positive evidence of *unusually extreme circumstances,* and should be thoroughly convinced that *material injustice is manifest* before exercising *any* such discretion to deny a citizen access to courts of this country." 218 F. 2d at 357* (emphasis supplied).

The *Burt* test was explicitly endorsed by the District of Columbia Circuit in *Founding Church of Scientology* v. *Verlag,* 536 F. 2d 429, 435-36 (D.C. Cir. 1976). Although the Court of Appeals in that case was convinced that the District of Columbia was a somewhat inconvenient forum for the defendant, it nevertheless reversed the district court's dismissal on *forum non conveniens* grounds because it did not appear that the plaintiff's choice of forum was "prompted by an intent to vex or harass." 536 F. 2d at 436. *See,* Bickel and Barrett, *supra,* p. 7; *see also, infra,* p. 19.

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* The *Mobil* and *Burt* opinions have been cited and followed in later opinions in their respective circuits. *See, Menendez Rodriguez* v. *Pan American Life Insurance Co.,* 311 F. 2d 429 (5th Cir. 1962), *vacated on other grounds,* 376 U. S. 779 (1964); *Hoffman* v. *Goberman,* 420 F. 2d 423 (3rd Cir. 1970); *Reavis* v. *Gulf Oil Corp.,* No. 78-343 (D. Del., filed February 20, 1980); *D'Angelo* v. *Petroleos Mexicanos,* 398 F. Supp. 72 (D. Del. 1975); *Poe* v. *Marquette Cement Manufacturing Co.,* 376 F. Supp. 1054 (D. Md. 1974); *Constructora Ordaz, N.V.* v. *Orinoco Mining Co.,* 262 F. Supp. 90 (D. Del. 1966).

On the other hand, the Ninth Circuit, while citing *Burt,* seems inclined toward a view similar to the Court below. *Mizokami Bros.* v. *Baychem Corp.,* 556 F. 2d 975 (9th Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978).

The decision of the district court herein, expressly ratified by the court below, dismissed this action because of "the lack of a substantial nexus between this controversy and the Southern District of New York combined with the inconvenience and *possible* prejudice to the defendant resulting from the retention of jurisdiction here." 453 F. Supp. at 12 (A-76) (emphasis supplied). It is a long unpassable way, verbally and factually, from "possible prejudice" to "manifest injustice." It cannot be seriously thought that the defendant's motion below could have met the rigorous standards of the Third, Fifth, and District of Columbia Circuits. This Court's guidance is needed.

2. The crucial precedential use of *Farmanfarmaian* v. *Gulf Oil Corp.* 588 F.2d 880 (2d Cir. 1978) in the opinion below makes it certain that the Court of Appeals has committed itself to the doctrine that American citizenship, even when coupled with American residence, is of no importance as to *forum non conveniens* dismissal.

An entire section of the Court of Appeals' opinion herein is headed simply, "FARMANFARMAIAN" (A-13). The reference is to *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F. 2d 880 (2d Cir. 1978). The exact nature of the lower court's reliance on *Farmanfarmaian* in this case is plainly symptomatic of serious confusion concerning *forum non conveniens* practice in suits in American courts by American citizens and evidences such a departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision" (Rule 19).

The district judge, in *Farmanfarmaian* v. *Gulf Oil Corp.*, 437 F. Supp. 910 (S. D. N. Y. 1977), says the case contains "all the ingredients of a fascinating novel," 437 F. Supp. at 913 —a novel, it may be added, requiring translation from the original Persian. Farmanfarmaian was an Iranian lawyer, resident in Iran. It does not appear from the opinions whether he had ever so much as been in the United States. His claims were of almost impenetrable complexity, but the contracts, the breaches, and the interferences with contract that he alleged, occurred, in

all this complexity, in Iran. Several Iranian corporations entangled in his net of allegations were not even amenable to jurisdiction in the United States; one was a subsidiary of the National Iranian Oil Co., a governmental corporation, so that Iranian national policy might be implicated. The substantive law the district court would have had to apply was Iranian law, pure if not simple. Farmanfarmaian's own expert witness testified that interpretations of that law as codified would entail the use of hermeneutic principles drawn from Islamic law, and from the civil law of continental Europe. The official text would be in Iranian. The district court's dismissal of this exotic case, on *forum non conveniens* grounds, was affirmed in the Second Circuit Court of Appeals.

It seems astounding that such a case could be thought to have value as precedent for a suit like the present, asserting a simple cause of action in maritime tort, sued on by a resident American national in an American admiralty forum. The connection perceived by the court below is that Farmanfarmaian, though nothing but an Iranian in all respects, was to be exactly equated to any American citizen, by virtue of a treaty guaranteeing Iranian nationals access to American courts, "upon terms no less favorable" than those applicable to American nationals. Thus, since *Farmanfarmaian* dismissed on *forum non conveniens* grounds a suit brought by an Iranian national, so may a court dismiss a suit by a real American national.

Even granting the algebraic cogency of this equation, a case like *Farmanfarmaian* is a poor vehicle indeed for settling finally the rights of real American citizens; the equities underlying their rights cannot have been sharply visible in *Farmanfarmaian*. But certain more categorical points must be made.

In strong contrast with the situation of petitioner herein, Farmanfarmaian was a *foreign resident*, a lifelong foreign resident so far as appears from the reports. The parallel case to *Farmanfarmaian* would then have to be that of a person tech-

nically an American citizen under one of the provisions of law making that possible to a lifelong foreign resident, *see* 8 U.S.C. § 1401, but with no other tie to the United States. It may be granted that the New York suit of such a person, resident in Iran, practicing law there, and suing on a complex and ineradicably Iranian cause of action, involving hard questions of law in a system as good as intellectually inaccessible to an American judge, might be dismissed on *forum non conveniens* grounds. The difficulty is in seeing what such a disposition, which would give full force to the *Farmanfarmaian* equation, would have to do with the present case *wherein citizenship is coupled with residency.**

There is another most revealing point in *Farmanfarmaian*, distinctly bridging to our case: The district judge in *Farmanfarmaian*, whose "discretion," in "weighing" *all* the factors, was deferred to as dispositive, 588 F. 2d at 882, had twice declared that he considered Farmanfarmaian's being an alien to be a significant factor, 437 F. Supp. at 923, 927. The Second Circuit Court of Appeals, though affirming the dismissal, felt "constrained to comment" that consideration of this factor was impermissible as a matter of law, because of the treaty provision. But if the affirmance rests on deference to the district judge's *discretion* (and the Court of Appeals made this unusually plain, even saying that it thought "the issue whether the action should have been dismissed is perhaps somewhat closer than Judge Carter suggested. . . ," 588 F. 2d at 882), then how could it have been known how the district judge's "discretion" would have sized up the factors *remaining*, had he known that one of the factors he *expressly considered* must, as a matter of law, be taken *out* of the balance—especially in a case the Court of Appeals itself thought to be rather close?

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* In his dissent below in our case, Judge Van Graafeiland alludes to certain facts of global political life that may often make quite problematic the sending of American citizens from their courts. Of those who think this concern exaggerated, one may ask, "How would you now feel about having, in December 1978, sent an American citizen to litigate in Iran, in a simple case of maritime tort?"

The hidden premise (and here the case banefully connects with ours) can *only* be that American citizenship of a plaintiff not only fails to be a categorical bar to dismissal, but is of such *de minimis* importance that it may be *assumed* that a *forum non conveniens* motion would be decided *with* it just as it was decided *without* it. This premise, brought to light, so transgresses common sense as to make unnecessary renewed citation of the uniformly contrary authorities. Yet it is the very premise that underlies the decision in our case.

3. The holding below—that it is immaterial to *forum non conveniens* disposition that the foreign court to which the case would probably have to go would limit recovery to 8% of the claim—is irreconcilable both with practical justice and with this Court's holding and opinion in *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964).

The Court of Appeals' opinion in this case says: "The primary concern of appellant [the present petitioner] *in resisting trial in Trinidad* is that it may recover only $570,000 rather than $8,000,000 from appellee [the present respondent], assuming the latter to have been at fault" (emphasis supplied). With respect, this is a startlingly backhanded way of putting the matter. The immediately visible "resistance" is *respondent's* "resistance", expressed in its *forum non conveniens* motion, to trial of a suit brought by an American plaintiff, of American residence, in an American court indisputably seized of jurisdiction under the Constitution and Acts of Congress. And of course respondent's "primary concern" expressed in *this* "resistance" is a well-founded hope of limiting petitioner's recovery (on the Court of Appeals' own figures) to about eight cents on the dollar of liability.

Van Dusen v. *Barrack*, 376 U. S. 612 (1964), is the most instructive authority on the question whether dismissal is proper when the forum to which plaintiff is remitted will apply a law drastically limiting recovery. This Court unanimously there held it impermissible, as *not being "in the interest of justice,"* see

376 U. S. at 626, for a transfer of a case under 28 U. S. C. § 1404(a) to bring about the application of the law of the transferee state, *principally its law of damages,* to the plaintiff's disadvantage. The case was remanded for reconsideration, but under firm direction that transfer must be ordered, if at all, *on condition that the transferee court apply the law of the transferor state.*

While this management of the matter may not be available as between nations, it is quite impossible that it can be *not* "in the interest of justice" for a 1404(a) transfer to result in a changed law greatly reducing damages, without its being likewise *not* "in the interest of justice" to dismiss a case such as this, where the real thing at stake is the virtual wiping-out of damages by the law of what is in effect the transferee nation.* The requirements for § 1404(a) transfer have been squarely held, in this Court, to be easier than those for *forum non conveniens* dismissal, *Norwood* v. *Kirkpatrick,* 349 U. S. 29, 32 (1955); this makes *Van Dusen* a dispositive authority in the present case.** The judgment of the court below in our case cannot live in the same world with the equity and rationale of *Van Dusen.*

Even without the weighty authority of *Van Dusen,* petitioner submits that to treat as entirely adequate the Trinidad remedy—eight cents on the dollar—or to treat its inadequacy as immaterial to the justice of dismissal, is a course that should have been rejected unless *compelled* by prior decisions. The court below

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* In *Van Dusen,* moreover, the Court approvingly cites a HARVARD LAW REVIEW Note saying, "It would be best . . . not to transfer at all where the law . . . applied in the transferee forum would be materially different from that applied by the transferring court", 376 U. S. 636, n. 35.)

** Indeed, in *DeMateos* v. *Texaco,* 562 F. 2d 895, 899 (3rd Cir. 1977), *cert. denied,* 435 U. S. 904 (1978), the Third Circuit stated that the principle of *Van Dusen*—that a 1404(a) transfer should not result in a change in the applicable law—"is no less applicable to a dismissal on *forum non conveniens* grounds."

cites no authority close to compelling.* *Canada Malting Co.* v. *Paterson Steamship, Ltd.*, 285 U. S. 413 (1932), the only cited authority coming from *this* Court, involved *nothing* but Canada and Canadians, except that at the moment of collision the two Canadian ships may "unintentionally" have wandered into United States waters, 285 U. S. at 423-424. Even so, the opinion by Mr. Justice Brandeis, affirming dismissal, "assumed" that if the libellants were "entitled to have applied the law of the United States" (which would have given a full recovery) the Canadian court would so hold, 285 U. S. at 424. On the other hand, it was left undecided and unclear whether the *American* court, if it had kept the case, should or would have applied the American rule more favorable to the libellant. 285 U. S. at 419. Thus, any difference between the recoveries would have had to flow from different conflicts-of-laws rules in the two nations; nothing (as Justice Brandeis's remark shows) pointed toward such a difference. Moreover, the respective faults of the vessels had not yet been judicially settled, 285 U. S. at 417-18; if the undamaged vessel were found solely at fault, it would have to pay all the damage, in Canada as well as in the United States. In any event, the possibility of a lesser recovery, even under Canadian law, was, in the view of this Court, created merely by the *possibility* that the damaged value of one of the colliding vessels "might" be insufficient to pay its part. 285 U. S. at 418. Therefore, for *four* clearly visible reasons, noticed by this Court, it was uncertain whether a Canadian judgment would turn out to be any smaller than an American judgment.

Koupetoris v. *Konkar Intrepid Corp.*, 535 F. 2d 1392 (2d Cir. 1976), also cited by the court below, involved a Greek seaman's injury; the only American "contact" was in the accident's occurrence "off the coast of the United States" 535 F. 2d 1396. That a Greek should be sent to Greek law with his claim against

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* The treatment of the amount of recovery factor in the District Court opinion in this case is brief, perfunctory, and without any suggestion that the District Court appreciated that what was involved was a virtual denial of recovery, 453 F. Supp. at 13 (A-77).

his Greek employer, as to a Greek-ship injury whose connection with the United States was "purely fortuitous," 535 F. 2d 1396, cannot be a holding that an American plaintiff may be sent from an American court, to a remedy of eight cents on the dollar. The prospect of less favorable Greek law was only vaguely alluded to; all the case suggests is that the *possibility* of some unfavorable aspect in the foreign law does not *compel* the denial of a motion to dismiss on *forum non conveniens* grounds, however crushingly onesided the case may otherwise be.*

Koupetoris cites *Fitzgerald* v. *Texaco, Inc.*, 521 F. 2d 448 (2d Cir. 1975). But *Fitzgerald*, read aright, looks the other way from the present decision, in an instructive passage uttered by the late Judge Anderson for the court:

> A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, even though the law applicable in the alternative forum *may be* less favorable to the plaintiff's chance of recovery. *Canada Malting Co., Ltd.* v. *Paterson Steamships*, 285 U.S. 413, 418-20, 52 S. Ct. 413, 76 L.Ed. 837 (1932). A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover. But the issue remains one of balancing the relevant factors, *including the choice of law.*
>
> —521 F. 2d at 453 (emphasis supplied)

The final emphasized words are crucial. If they mean anything, in the context, they mean that a court *may and should* take into account the *actual effect* of remitting plaintiff to foreign law; this is to be a "relevant factor." Going on, Judge Anderson finds it to be only a "minimal possibility", in the very case, that plaintiff would be "adversely affected by dismissal," 521 F. 2d at 453. This emphatically can *not* be said of this case.

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* The final citation on this point (A-29) in the passage in the opinion of the court below, *Kloeckner Reederei etc.* v. *A/S Hakedal* (The Western Farmer), 210 F. 2d 754 (2d Cir. 1954), must have been inserted by inadvertence; that case *reversed* dismissal of a suit between two foreigners of differing nationality.

Turning from cases to the reason and justice of the matter: How low would a recovery have to go to be a recovery in name only? Four cents, two cents on the dollar? Eight cents on the dollar is pretty low. It would not be an "adequate remedy at law" for ancient equity-jurisdiction purposes. Law is a practical subject; eight cents on the dollar is so close to no remedy at all as to be treated, in law, as just that.

The court below has herein staged Hamlet without the Prince of Denmark. It first emphasizes the highly "discretionary" nature of the *forum non conveniens* dismissal; *all* relevant factors are to be considered, in an open series unbounded by doctrine. Then it proceeds to eliminate, *as a matter of strict law*, the overwhelmingly dominant relevant factor—that the remedy to which the American plaintiff-petitioner is remitted is 92% no remedy at all. The only possible case in which such a rule would even arguably conform to the "interest of justice" (see *Van Dusen, supra*) would be a case in which harrassment, vexation or imposition were plainly shown—a court might perhaps then say, "Your invocation of our jurisdiction is so grossly improper that we do not care what happens to you elsewhere." That is also the only sort of case in which, until quite recent times, home-resident American citizens were thought dismissable out of their own courts on *forum non conveniens* grounds (*supra* pp. 6-12). In two ways, then, the court below has treated the plaintiff in a manner suitable only in cases of harrassment or imposition—things not even allegedly present.

The laws involved here are the limitation of liability statutes of the United States and of Trinidad and Tobago. The American statute, particularly after its painstaking redrafting in 1935 and 1936, is a *policy compromise* constructed by Congress—setting, in effect, not only upper but lower limits, as being just and equitable in Congress' view, *see* 46 U.S.C. § 183. An American plaintiff should not be denied the benefit of that compromise, where jurisdiction is unmistakeably present, under an Act of the Congress itself.

There is startling asymmetry in this result. If this vessel had been destroyed, and if respondent had brought one of her lifeboats into a United States port and petitioned for limitation, that petition would have been retained and the petitioner invited to come in and get its .002 mils on the dollar. *Oceanic Steam Navigation Co.* v. *Mellor* (The Titanic), 233 U.S. 718 (1914). The forum would not be "inconvenient" in that case. Indeed, this unfair asymmetry is pervasive. In many cases of this type, the stand of the court below would mean that the *defendant,* rather than the plaintiff, has his choice of forum. Many defendants are not servable with process in the *locus delicti* without their consent. On the other hand, the defendant always has a *choice* whether to move for *forum non conveniens* dismissal in the plaintiff's home court. Thus, a defendant might *either* make itself available for suit in the forum *loci delicti,* and get the plaintiff's home suit dismissed, *or* stay out of the foreign country, and wait for the plaintiff to sue here or nowhere.

If one were to choose, as to fairness, between the two limitation statutes involved, the American statute must prevail as to this case. Limitation of liability is in derogation of the merits. And the American statute has at least been reworked once in the century now waning. The Trinidad and Tobago statute came into force there by virtue of general doctrines as to applying British law to the colonies. It dates from 1894, three years before Queen Victoria's Diamond Jubilee. Its per-ton limitation of £ 8 has outlived so much inflation as to be not merely inadequate but derisory; it has as much to do with practical modern justice as 1894 rules on controlling horses have to do with the safe piloting of jet aircraft. To send this respondent rejoicing toward its all but total shelter would be to bestow a windfall resulting from the merely inertial Trinidad failure to revise this ancient statute, against the background of earlier failure of the British Parliament to extend its own updatings to the Colonies—a chain of mere legal accidents. The statute has, so far as petitioner can discover, never been judicially invoked in Trinidad and Tobago, and therefore, if this petition fails of success, will have lived out its fourscore and six years there toward the sole

end of allowing respondent herein virtually to escape liability for its own egregious fault. This is not "in the interest of justice," *Van Dusen* v. *Barrack, supra.*

4. This Court should define narrowly the role of "discretion", operating on such miscellaneous and variable factors as "court congestion", in repelling Americans from their own courts.

There is some ambiguity running through the opinions below as to the matter of "discretion." *See, e.g.,* Judge Timbers's dissent, in the three-judge panel on first rehearing (A-52-53).

Petitioner here only suggests that an effective power (under any name in any court) to send an American plaintiff to a foreign forum, on assorted balance-of-convenience grounds, with as good as no rule-bound guidance at all, is an unthinkable way to deal with the problem of Americans' access to their own judiciary. It would result in the toleration of differing and unpredictable results on this vital matter, from circuit to circuit, from district to district, and even from judge to judge—and, as to all these, from time to time. *This* Court is the sole proper authority to mark generally—and strictly—the bounds of this "discretion". A major shift in the law of American citizenship should not occur under the name of "deference" to the unfenced "discretion" of district courts.

The disastrous effects of such unloosing of "discretion" may be shown by specific reference to the use, in both courts below, of the factor of court "burden" or "congestion" as of material weight (A-18, A-74). To say that such "congestion" is to be a factor, entering, into the striking of a "discretionary" balance, is to say that the luck of American resident citizens in gaining access to their own courts is to vary from district to district, and from time to time in the same district, *because the "congestion" factor itself must so vary.* This is perhaps tolerable as to suits between foreigners, wherein there is an element of accommodation, *cf. Bickel, supra,* p. 7. It is not tolerable that the access of Americans to their courts depend on the respective states of the dockets of the several judicial districts, as evaluated by district

judges from year to year—far less tolerable than it would have been to remand to the state courts, on congestion grounds, properly removed diversity cases, *see Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 344 (1976).

Free "discretion" herein would invite American litigants into a mere guessing-game; they would have to divine whether their desire for an American forum—a desire recognized as normal and in no way reprehensible by all authorities—has, in prudence, to give way to a chancy sizing-up of the likelihood of a "discretionary" dismissal, on *forum non conveniens* grounds, by the particular district judge before whom the motion may come on—with all the attendant expense and delay.* This cannot be a satisfactory state of the law.

The result in this case—the "discretionary" dismissal of a *bona fide* American plaintiff from United States courts, to a foreign forum where the remedy is as good as non-existent, with no showing of harassment, vexation, or imposition—has been attained by piecing together sayings in past opinions, without subjection of these to the control of the facts surrounding them, or of the doctrinal context in which they were uttered. *This Court* has never yet held that a home-resident American plaintiff can be sent from the American forum to a foreign forum, or that any plaintiff can be remitted to a remedy so partial as to amount to no remedy. It has never even been whispered that these two things could be combined, as they are here.

The issues thus framed are meet for this Court's attention.

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* The delays in this case are at least illustrative: The district court opinion was not rendered until about a year after the motion was made (during which time the Court could have, but did not, ask defendant to give proof of its unsupported allegations concerning witnesses and "necessary" parties) and the most recent opinion of the Court of Appeals was rendered over three years after the action was brought. All this in a case which undoubtedly would have been promptly settled without trial if the district court had denied defendant's motion.

Conclusion

For all the foregoing reasons, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Dated: May 22, 1980

Respectfully submitted,

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APPENDIX A

Statutes Involved

U.S. CONST. art. III, § 2, cl. 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority; . . . to all cases of admiralty and maritime Jurisdiction; . . . ."

U.S. CONST. art. IV, § 2, cl. 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

46 U.S.C. § 183(a): "The liability of the owner of any vessel, whether American or foreign . . . for any loss, damage, or injury by collision . . . done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

APPENDIX B

Opinions Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1558—August Term, 1978

(Submitted to the En Banc
Court April 2, 1979 Decided February 25, 1980.)

Docket No. 78-7054

ALCOA STEAMSHIP COMPANY, INC.,

Plaintiff-Appellant,

M/V NORDIC REGENT, Her boilers, tackle, machinery and other appurtenances *in rem,* and NORCROSS SHIPPING CO., INC., as her Owner, *in personam,*

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
FEINBERG, MANSFIELD, MULLIGAN, OAKES, TIMBERS,
GURFEIN,* VAN GRAAFEILAND
and MESKILL, *Circuit Judges.*

* Judge Gurfein, who was a member of the en banc Court, unfortunately died on December 16, 1979. Prior to his death, he had voted to affirm the judgment of the district court. He did not have the opportunity, however, to see this opinion prior to his death.

En banc reconsideration of an appeal from a judgment entered in the Southern District of New York, William C. Conner, *District Judge*, 453 F.Supp. 10 (S.D.N.Y. 1978), which conditionally dismissed an admiralty action on the ground of forum non conveniens.

Judgment and opinion of panel on rehearing, ____ F.2d ____, vacated; judgment of district court affirmed.

J. WARD O'NEILL, Gordon W. Paulsen, Emil A. Kratovil, Jr., and Haight, Gardner, Poor & Havens, New York, N.Y., *for plaintiff-appellant Alcoa Steamship Company, Inc.*

HOLLIS M. WALKER, Richard A. Corwin, Vera E. Weinberg, and Walker & Corsa, New York, N.Y., *for defendants-appellees M/V Nordic Regent and Norcross Shipping Co., Inc.*

DOUGLAS A. JACOBSEN, Robert S. Burrick, and Bigham Englar Jones & Houston, New York, N.Y., *for American Institute of Marine Underwriters, Amicus Curiae.*

TIMBERS, *Circuit Judge* (with whom Chief Judge Kaufman, Feinberg, Mansfield, Mulligan and Meskill, *Circuit Judges,* concur):

We have before us for en banc reconsideration an appeal from a judgment entered in the Southern District of New York, William C. Conner, *District Judge,*

453 F.Supp. 10 (S.D.N.Y. 1978), which conditionally dismissed an admiralty action on the ground of forum non conveniens.

The essential question presented is what is the proper standard for determining a motion to dismiss an admiralty action on the ground of forum non conveniens when the action has been brought by an American resident libelant in a United States district court and when there is an alternative forum abroad.

For the reasons below, we hold that the proper standard is that set forth by the Supreme Court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947), and recently adhered to by our Court in *Farmanfarmaian v. Gulf Oil Corp.,* 588 F.2d 880 (2 Cir. 1978). The district court properly applied that standard in the instant case. It held in the exercise of its discretion, after carefully balancing the relevant factors, that conditional dismissal on the ground of forum non conveniens was warranted. Since we hold that the district court applied the proper standard and we find no abuse of discretion on its part, we vacate the judgment and opinion of the panel on rehearing, ____ F.2d ____, and affirm the judgment of the district court.

I.

The facts relevant to this appeal are simple and straightforward.[1]

Shortly before midnight on January 2, 1977 the M/V Nordic Regent ("the vessel") collided with a transfer

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1 We assume familiarity with the statements of fact set forth in the opinion of the district court, 453 F.Supp. 10, and in the two sets of panel opinions of this Court, ——— F.2d ———, slip op. 4587 (August 31, 1978) and ——— F.2d ———, slip op. 5367 (January 10, 1967). Our August 31 panel decision, by a divided

station ore pier owned by Alcoa Steamship Company, Inc. ("Alcoa") located in Port Tembladora, Trinidad, West Indies, causing, according to Alcoa's claim, an estimated $8,000,000 of damage to its pier. At the time of the collision, the vessel was under charter to Alcoa as an ore carrier. The vessel was owned by the Norcross Shipping Co., Inc. ("Norcross"), a Liberian corporation. Alcoa is a New York corporation engaged in business here and abroad.

Alcoa claims that the collision was due chiefly to the failure of the master of the vessel to take on a local pilot before entering the harbor, as required by Trinidad and Tobago statutory law. *See Empire Transport, Inc.* v. *United States*, 524 F.2d 1,5 (2 Cir. 1975). Apparently the master was informed by radio that a pilot would meet the vessel at a point about one-half mile from the harbor. The pilot was not there when the vessel arrived. Rather than waiting for the pilot, the master proceeded into the harbor without a pilot and attempted to tie up at the pier on his own. The collision between the vessel and the pier resulted.

Alcoa commenced the instant admiralty action in the Southern District of New York to recover the property damage to its pier in Trinidad claimed to have resulted from the alleged negligence of the vessel and its master. Alcoa named as defendants the M/V Nordic Regent and its owner, Norcross. Process was served on Norcross through its general agent in New York. Norcross moved to dismiss the action on the ground of forum non conveniens.

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vote, affirmed the district court's conditional dismissal of the action on the ground of forum non conveniens. Our January 10 panel decision, by a differently divided vote, withdrew the original panel affirmance and reversed the district court. It is the latter panel decision which is the subject of the instant en banc proceeding in this Court.

The district court took the motion to dismiss on submission, based on the pleadings, affidavits and briefs of the parties—a practice long recognized as acceptable and followed from time immemorial in the busy Southern District of New York in determining forum non conveniens motions. *E.g.*, *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 531 (1947); *Vanity Fair Mill, Inc.* v. *T. Eaton Co.*, 234 F.2d 633, 645 (2 Cir.), *cert. denied*, 352 U.S. 871 (1956).

On January 17, 1978, Judge Conner filed a thoughtful, concise opinion, 453 F.Supp. 10, which set forth in detail the contentions of the respective parties and carefully balanced the factors which should be considered in applying the doctrine of forum non conveniens under *Gilbert*, *supra*.[2] This was the crux of the judge's decision:

> "This Court is persuaded that the lack of a substantial nexus between this controversy and the Southern District of New York combined with the inconvenience and possible prejudice to the defendant resulting from retention of jurisdiction here—

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2 We believe that it is neither necessary nor appropriate to recount in detail the contentions of the parties in the district court or the *Gilbert* factors relied on by Judge Conner in exercising his discretion in granting the forum non conveniens motion. They are fully set forth in the district court opinion. Moreover, the issue that triggered the instant en banc proceeding was not whether the judge had abused his discretion; rather, it was the legal issue as to what is the proper standard for determining a motion to dismiss an admiralty action on the ground of forum non conveniens. The panel majority, in its January 10, 1979 opinion, held for the first time that the *Gilbert* standard "does not, and should not, establish the correct standard for determining when American citizens should have access to their country's admiralty courts." ——— F.2d at ———, slip op. 5367, 5368. That was the proposition urged by Alcoa in its petition for rehearing addressed to the panel; it was adopted by the panel by a divided vote; and it is the central issue before us in this en banc proceeding.

> which substantially outweigh any inconvenience plaintiff may suffer—renders this an inappropriate forum; an evaluation of the contentions of the parties compels the conclusion that the litigation of this case can be conducted most expeditiously and inexpensively in Trinidad." 453 F.Supp. at 12.

Accordingly, defendant's motion to dismiss on the ground of forum non conveniens was granted—but not unconditionally. The judge imposed two important conditions which are best stated in his opinion:

> "Finally, dismissal will not leave plaintiff without any remedy. Defendant has agreed to submit to the jurisdiction of the courts of Trinidad as a condition of dismissal of this suit; moreover, defendant has already commenced a suit in Trinidad which establishes its presence there for purposes of suit by plaintiff. Defendant has also offered a letter of guaranty that a Trinidadian judgment will be satisfied and agreed that this may be made a condition of the dismissal of this action.
>
> . . . .
>
> . . . [D]efendant's motion to dismiss is granted, subject to reinstatement in the event that defendant shall fail to submit to jurisdiction in Trinidad with respect to the subject matter of this action and execute the guaranty of satisifaction of judgment described above." *Id.* at 13.

From the judgment entered on Judge Conner's opinion, Alcoa appealed, resulting in the two panel decisions referred to above, note 1, *supra*, and the instant

en banc proceeding which is directed to the second panel decision.

With the foregoing brief summary of the facts and prior proceedings in mind, we shall consider in the remainder of this opinion (1) the applicability to admiralty actions of the Supreme Court's *Gilbert* standard, as reaffirmed by our Court in *Farmanfarmaian*, for determining motions to dismiss on the ground of forum non conveniens; (2) whether the admiralty nature of the action or the American citizenship of the plaintiff justifies creating a special rule of forum non conveniens; and (3) whether the district court in the instant case, in conditionally dismissing the action on the ground of forum non conveniens, abused its discretion under the *Gilbert* standard.

II.

We turn first to the applicability to admiralty actions of the Supreme Court's *Gilbert* standard, as reaffirmed by our Court in *Farmanfarmaian*, for determining motions to dismiss on the ground of forum non conveniens.

(A) GILBERT

For more than three decades, Justice Jackson's opinion in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), has been recognized as the leading authority on forum non conveniens. That case involved an action commenced in the Southern District of New York by a Virginia plaintiff against a Pennsylvania corporation to recover damages caused by a fire in a warehouse located in Lynchburg, Virginia. Acknowledging that a court "may resist imposition upon its jurisdiction", 330

U.S. at 507,[3] the Supreme Court, in reversing our Court, approved the district court's dismissal of the action on the ground of forum non conveniens. In doing so, the Court set forth the factors to be considered by the trial court, in the exercise of its discretion, in determining whether to grant or deny a motion to dismiss on the ground of forum non conveniens.[4] These are precisely the factors which the district court below

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3 Scottish judges were the originators of the idea that a law court could refuse to hear a case over which it had jurisdiction. The distinction between forum non conveniens and forum non competens in non-admiralty cases first emerged in Scotland about 1845. Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 909 (1947) (hereinafter cited as Braucher). The English courts, however, generally were unsympathetic to the idea. *E.g.*, *Clements* v. *Macauley*, 4 Macph. 583, 592-93 (1866), cited in Braucher, *supra*, at 910. Even at the time of the Supreme Court decision in *Gilbert*, the English standard for granting a motion to dismiss on the ground of forum non conveniens required a showing that the trial of the case in the chosen forum would be vexatious and oppressive—in effect, the standard urged upon us by appellant in the instant case. *Williams* v. *Green Bay & W. R.R.*, 326 U.S. 549, 554-55 n.4 (1946).

4 The factors set forth by the Court were the following:

"If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation

evaluated before conditionally granting the instant motion to dismiss. 453 F.Supp. at 11-13.

Gilbert recognized that "unless the balance [of convenience] is strongly in favor or the defendant, the plaintiff's choice of forum should rarely be disturbed." 330 U.S. at 508. The decision also made clear that more than the private convenience interests of the litigants—and much more than the plaintiff's subjective intent—should be considered by the federal courts in acting on forum non conveniens motions. The interests of justice and court efficiency also must be weighed.

The standard of *Gilbert* is thus a twofold one—involving both the court's public interest concerns and the private interests of the parties. As one commentator put it, the *Gilbert* standard "nicely blends" considerations of harassment by the parties with a balancing of conveniences. Braucher, note 3, *supra*, at 923.

On the same day that *Gilbert* was decided, Justice Jackson announced the opinion for the Court in another forum non conveniens case. *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947). In that case, a derivative action commenced in the Eastern District of New York by a New York plaintiff against Illinois defendants, the Supreme Court, in af-

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is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foriegn to itself." 330 U.S. at 508-09 (footnote omitted).

firming our Court, again approved the district court's dismissal of the action on the ground of forum non conveniens. In doing so, the Court stated:

> "Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which *either* (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, *or* (2) *make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.* In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." 330 U.S. at 524 (emphasis added).

Contrary to appellant's argument before us, we do not believe that the Court's decision in *Koster* establishes a standard other than that of *Gilbert* for derivative actions, which in turn appellants urge should be expanded for the benefit of American resident libelants in admiralty actions. Justice Jackson's opinion in *Koster* gives no hint of such a departure from *Gilbert*. Indeed, the factors weighed by the *Koster* court are precisely those of the public and private tests—judicial administration and harassment—discussed in *Gilbert*. The Court in *Koster* of course recognized that "[t]he complexities and unique features of [derivative] actions, however, are relevant to the *forum*

non conveniens issue . . . ." 330 U.S. at 522. This bespeaks not advocacy of a separate test for derivative actions but a pragmatic application of the general equitable principles outlined in *Gilbert*. In short, we believe that *Koster* should be read as a consistent, pragmatic application of *Gilbert*, rather than an exception to it.[5]

(B) FARMANFARMAIAN

Hardly a year ago, our Court had occasion to consider the matter of forum non conveniens. We concluded that American citizenship alone is not a barrier to dismissal on the ground of forum non conveniens and that *Gilbert* still provides the controlling standard. *Farmanfarmaian* v.*Gulf Oil Corp.*, 588 F.2d 880 (2 Cir. 1978).

In *Farmanfarmaian*, which was decided before the recent change of government in Iran, an Iranian citizen commenced an action in the Southern District of New York for breach of a contract with an Iranian subsidiary of various American and European oil companies. Plaintiff also claimed tortious interference with contract rights. The contract was entered into in Iran. It involved an option to purchase an Iranian company. Evidence relating to the breach, and particularly the role of the Iranian government, was in Iran. Iranian law was to govern. Although plaintiff was a foreign national, his suit nevertheless presented squarely the question of the district court's power to remit an American plaintiff to a foreign forum. This was so because a bilateral treaty between the United States and Iran granted Farmanfarmaian "access to [this]

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5 Moreover, the abuse of discretion standard appears to be the same in both cases. *Gilbert*, 330 U.S. at 508-09; *Koster*, 330 U.S. at 531-32.

country's courts on terms no less favorable than those applicable to nationals of the court's country." 588 F.2d at 882, citing 8 United States Treaties and Other International Agreements 900, 902-03 (1957). For the purpose of the forum non conveniens motion, therefore, the courts were obliged to, and did, apply the same forum non conveniens standard as would have been applied if Farmanfarmaian were an American citizen.

In an opinion by Judge Feinberg, the Court affirmed the dismissal of the action on the ground of forum non conveniens. It follows, if this recent decision of our Court means anything, that American citizenship is *not* an impenetrable shield against dismissal on the ground of forum non conveniens.

Aside from our concern for the preservation of a uniform standard for determining forum non conveniens motions, *Farmanfarmaian* demonstrates another policy reason for adhering to a uniform standard, namely, not to run afoul of treaty obligations of the United States. We maintain Treaties of Friendship, Commerce and Navigation, or similar agreements, with dozens of foreign nations. Many include "no less favorable" treatment clauses like the one found in the Iranian treaty addressed in *Farmanfarmaian*.[6] The

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6 Between 1946 and 1953 alone, the United States concluded nine bilateral treaties (with China, Italy, Ireland, Uruguay, Colombia, Greece, Israel, Ethiopia and Egypt), all of which provided for access to each country's courts on a "national treatment" basis, with eight specifying access on a mostfavored-nation basis. Wilson, *Access-to-Courts Provisions in U.S. Commercial Treaties*, 47 Am.J.Intl.Law 20, 45 (1953); 20 Harv. Int'l L.J. 404, 411 n.40 (1979) (relevant treaties summarized). Other more recent treaties with similar provisions include Agreement on Trade Relations, Mar. 17, 1978, United States-Hungary, T.I.A.S. No. 8967; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14

approach urged upon us by appellant—requiring a showing of vexation before an action may be dismissed on the ground of forum non conveniens when the plaintiff is an American citizen—would leave the federal courts on the horns of a difficult dilemma if the action involved a plaintiff who is the beneficiary of such a treaty clause. The courts either would be obliged to apply this same vexation standard to foreign nationals who are the beneficiaries of such clauses, thus barring dismissal for all practical purposes and crippling the concept of forum non conveniens, or they would have to do violence to our treaty obligations which of course are paramount under the Constitution. Under the approach we take today—adhering to the simple uniform standard of *Gilbert* in all instances—this problem will not arise.

U.S.T. 1284, 1289; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1961, United States-Denmark, 12 U.S.T. 908, 912.

It might be argued that such provisions were not meant to govern a forum non conveniens situation. Protocols to the Danish and Belgian treaties mentioned above, for example, both refer specifically to entitlement to legal aid as being encompassed within the term "access". But as the Danish protocol makes clear:

> "The term 'access' as used in Article V, paragraph 1, comprehends, *among other things*, access to free legal aid and right to exemption from providing security for costs and judgment." 12 U.S.T. at 937 (emphasis added).

Obviously, the protocol does not limit the meaning of access to entitlement to legal aid or privileges relating to security (which themselves are not unrelated to the typical forum non conveniens issue). Nor is such a provision a constant in the treaties mentioned above. The parallel Belgian protocol refers only to legal aid, 14 U.S.T. at 1309. The treaty involved in *Farmanfarmaian* contained no such protocol provision at all. Further, the argument for a limiting construction of the treaties based on such protocols would conflict with the clearest meaning of access to the courts. Such access would have little value if the door that admits is a revolving one. Finally, the chief flaw in this approach is that it is precisely contrary to the interpretation of the Iranian treaty reached by this Court in *Farmanfarmaian*.

III.

We turn next to a consideration of whether the admiralty nature of the action or the American citizenship of the plaintiff justifies creating a special rule of forum non conveniens. We hold that they do not.

(A) ADMIRALTY NATURE OF ACTION

There is neither reason nor authority for creating an exception to the general forum non conveniens standard established in *Gilbert* simply because the case invokes the admiralty and maritime jurisdiction of the court. Our Court consistently has applied the *Gilbert* standard in reviewing dismissals on the ground of forum non conveniens in admiralty cases. *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448 (2 Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Frangiskatos* v. *Konkar Maritime Enterprises*, 471 F.2d 714, 715 (2 Cir. 1972) (per curiam); *Grammenos* v. *Lemos*, 457 F.2d 1067, 1074 n.5 (2 Cir. 1972); *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 501 (2 Cir. 1966) (Kaufman, J.). *Accord*, *Paper Operations Consultants Int'l, Ltd.* v. *SS Hong Kong Amber*, 513 F.2d 667, 671 (9 Cir. 1975); *Yerostathis* v. *A. Luisi, Ltd.*, 380 F.2d 377, 378 (9 Cir. 1967); *Texaco Trinidad, Inc.* v. *Astro Exito Navegacion S.A.*, 437 F.Supp. 331, 333 (S.D.N.Y. 1977); *Bernuth Lembcke Co.* v. *Siemens A/G*, 1976 A.M.C. 2175 (S.D.N.Y. 1976); *Transomnia G.m.b.H.* v. *M/S Toryu*, 311 F.Supp. 751, 752 (S.D.N.Y. 1970). *See also Norwood* v. *Kirkpatrick*, 349 U.S. 29, 36 n.1 (1955) (Clark, J., dissenting) (treating *Gilbert*, *Koster* and *Canada Malting*, *infra*, as manifestations of a single doctrine of forum non conveniens).

Ironically—in view of the special rule of forum non conveniens for admiralty actions urged by appellant—it is in the field of admiralty that our federal courts have applied the doctrine of forum non conveniens most flexibly and over the longest period of time. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12 (1949); Braucher, note 3, *supra*, at 920-21. Forum non coveniens has been applied by our federal courts in admiralty actions for almost 180 years. *See, e.g., Willendson* v. *Forsoket*, 29 F.Cas. 1283 (D.Pa.—1801) (No. 17,682). The Supreme Court has approved its application in admiralty actions for many years. *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932); *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515 (1930); *The Belgenland*, 114 U.S. 355 (1885).

The readiness of the courts to apply the doctrine of forum non conveniens in maritime cases has stemmed in part from admiralty's equitable nature, *see Gulf Oil Corp.* v. *Gilbert*, *supra*, 330 U.S. at 513-14 (Black, J., dissenting), and in part from the absence of the usual venue requirements.[7] In most other areas, venue statutes for many years were expected to perform the function of case distribution. In admiralty, where no such statutes are applicable, forum non conveniens grew up instead. The anomolous result urge upon us by appellant would be this: whereas areas *with* venue statutes have been recognized as appropriate for the application of liberal forum non conveniens rules, one of the few areas *without* effective venue requirements—adm-

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7 In maritime cases, the transitory nature of the security available to the libelant was thought to justify the application of the forum rei sitae doctrine. Bickel, *supra*, at 45-46.

iralty—would be stripped of an important means of controlling its allocation of cases.[8] In view of the concentration of admiralty litigation in this Circuit, the burden this would impose on the Southern and Eastern Districts of New York would be considerable.

In short, admiralty and maritime law, far from being an exception to the general body of law on forum non conveniens—as appellant suggests—actually is its source.

(B) AMERICAN CITIZENSHIP OF PLAINTIFF

The trend of both the common law generally and admiralty law in particular has been away from according a talismanic significance to the citizenship or residence of the parties.

(1) The Common Law Generally—The State Courts

Few areas of the law have experienced such a dramatic recent evolution as the doctrine of forum non conveniens. Responding as it has to changed circumstances with the flexibility that has long typified the common law, the doctrine today must adapt to a world whose nations—and litigants—are growing more closely linked by bonds of commerce and culture.

In 1955 Justice Clark could find but a single jurisdiction, Scotland, which had permitted dismissal on the ground of forum non conveniens against a resident plaintiff. *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 41 (1955) (Clark, J., dissenting). The pendulum has now swung in the opposite direction.

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8 This is a fortiori so because in admiralty a foreign court usually will be the alternative forum—one of the few remaining areas where 28 U.S.C. § 1404(a) is not applicable.

One of the most significant indications of this trend was the rejection by the New York Court of Appeals in 1972 of its rule of long-standing that the New York residence of either party to an action barred a New York court from dismissing the action on the ground of forum non conveniens. *Silver* v. *Great American Insurance Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).[9] *Accord*, *Al Nyman & Son, Inc.* v. *United States Lines, Inc.*, 44 A.D.2d 516, 353 N.Y.S.2d 8 (1st Dept. 1974) (per curiam), (conversion action dismissed on forum non conveniens grounds where tortious acts occurred outside of New York, despite plaintiff's New York residence and the fact that corporate defendant's principal place of business was in New York); *Heller* v. *National General Corp.*, 39 A.D.2d 688, 332 N.Y.S.2d 511 (1st Dept. 1972) (per curiam) (*Silver* applied in dismissing New York plaintiff's action on forum non conveniens grounds).

The crux of the *Silver* rule recently was summarized by Judge Feinberg: "If litigation is in a clearly inconvenient forum, why should defendant and the court be burdened with its continuing there, if an alternative forum now exists so that plaintiff will not be without a remedy?" *Schertenleib* v. *Traum*, 589 F.2d 1156, 1163 (2 Cir. 1978).

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9 The *Silver* decision prompted Dean McLaughlin to remark: "At long last, the New York Court of Appeals has abandoned this primitive rule." N.Y. Civ. Prac. Law Rule 327 (McLaughlin, Practice Commentary) (McKinney Supp. 1979).

Another commentator noted at the time of the decision in *Silver* that seven states had "flatly ruled that a case may be dismissed despite residence of a party." (California, Delaware, Massachusetts, New Jersey, Oklahoma, Pennsylvania, and Wisconsin). An intermediate appellate court of Florida had gone the other way. 39 Brooklyn L. Rev. 218, 223-24 & nn. 38-39 (1972).

The fallacy of conditioning forum non conveniens relief solely upon the residence or place of incorporation of the plaintiff was stated forcefully by Chief Judge Fuld in *Silver*:

> "Although such residence is, of course, an important factor to be considered, *forum non conveniens* relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties. The great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation." 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402-03.

Since *Silver* the trend in that direction has accelerated. The following recent cases favor a liberal application of forum non conveniens rules in the state courts:[10] *Turner* v. *Evers*, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (App. Dep't Super. Ct. 1973) (following *Silver*, and applying California statute, rejected bar to forum non conveniens based on residence of parties);

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10 Of the scattered states which do not follow the doctrine, some have declined to do so because of peculiar provisions of their state constitutions which have been construed to guarantee residents a local forum. *E.g.*, *McDonnell-Douglas Corp.* v. *Lohn*, 557 P.2d 373 (Colo. 1979); *Chapman* v. *Southern Ry.*, 230 S.C. 210, 95 S.E.2d 170 (1956). As indicated at note 12, *infra*, there is no such provision where admiralty jurisdiction is concerned. Apparently the only state where the court of last resort has continued to reject the doctrine as a matter of common law is Florida. *Houston* v. *Caldwell*, 347 So.2d 1041 (4th Dist. Ct. App. 1977) (residency held not to be key to deciding forum non conveniens motion), *rev'd*, 359 So.2d 858 (Fla. 1978).

Carr v. *Bio-Medical Applications of Washington, Inc.*, 366 A.2d 1089 (D.C. 1976) (rejected District of Columbia residence of plaintiff as bar to forum non conveniens dismissal); *Cray* v. *General Motors Corp.*, 389 Mich. 382, 207 N.W.2d 393 (1973) (rejected Michigan residence of defendant as bar to forum non conveniens dismissal); *In re the Marriage of Dunkley*, 89 Wash. 2d 777, 575 P.2d 1071 (1978) (applied forum non conveniens in dismissing proceeding involving petition for modification of decree governing custody of children by a Washington resident father); *Werner* v. *Werner*, 84 Wash. 2d 360, 371, 526 P.2d 370, 378 (1974) (overruled earlier contrary position with comment, "Most of the states in that minority [those that had rejected forum non conveniens] have since reversed their position and embraced the forum non conveniens doctrine in some form."). Indeed, the Michigan Supreme Court in *Cray* v. *General Motors*, *supra*, counted twenty-one states which followed the doctrine of forum non conveniens in 1973. 389 Mich at 392, 207 N.W.2d at 397.[11]

(2) Federal Law Generally

More than thirty years ago—shortly after *Gilbert* and *Koster* were decided—Congress codified the principles underlying forum non conveniens in enacting 28 U.S.C. § 1404(a). *See* Reviser's Note, stating that § 1404(a) "was drafted in accordance with the doctrine of forum non conveniens", quoted in *Sullivan* v. *Behimer*, 363 U.S. 335, 363 n.14 (1960) (Frankfurter, J.,

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11 The common law trend toward liberal application of the doctrine of forum non conveniens has been reflected in legislation which has achieved the same result in several states. *E.g.*, Calif. Civ. Proc. Code § 410.30 (West); Wis. Stat. § 262.19. The federal transfer statute, 28 U.S.C. § 1404(a) (1976), was the forerunner of the state statutes.

dissenting). Section 1404(a) therefore codifies a part of the district court's "inherent power", *Gilbert*, *supra*, 330 U.S. at 502, to transfer cases to more appropriate places for trial.

The standard for obtaining a *transfer* of a case under § 1404(a) is more easily satisfied than is the standard for obtaining *dismissal* on forum non conveniens grounds. *Norwood* v. *Kirkpatrick*, *supra*, 349 U.S. at 32. Accordingly, for most cases in the federal courts, the easier standard of § 1404(a) has superseded the doctrine of forum non conveniens. *Hoffman* v. *Blaski*, 363 U.S. 335, 342 (1960). It would be anomalous for us to hold—as appellant urges—that a standard *stricter* than *Gilbert* should be applied in a range of cases which is not covered by § 1404(a) and which had been subject to a liberal dismissal rule before enactment of § 1404(a). Such an interpretation might be understandable if there had been no doctrine of forum non conveniens extant when § 1404(a) was enacted in 1948. In that event it might be urged that Congress did not wish to apply a more liberal dismissal standard to cases not covered by the statute. But such an interpretation makes no sense at all in light of the actual situation, since it was the statement of the general standard of forum non conveniens in cases such as *Gilbert* which led to the enactment of § 1404(a).

Moreover, there are cases where federal courts—including ours—have sanctioned sending an American citizen to another forum for trial pursuant to a defendant's motion to dismiss on the ground of forum non conveniens. The "reluctance" with which this has been done, described in *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F.2d 633, 646 (2 Cir.), *cert. denied*, 352 U.S. 871 (1956), appears not to be as profound as the lan-

guage might suggest. Indeed, in *Vanity Fair* — a landmark case in which Judge Waterman recognized the precept that "[a]n American citizen does not have an absolute right under all circumstances to sue in an American court", *id.* at 645—the precise issue of the deference to be accorded the citizenship of an American plaintiff confronted with a motion to dismiss on the ground of forum non conveniens was not squarely involved in the court's decision. Judge Waterman did acknowledge, however, that "the balance of convenience is strongly in favor of" the defendant, before going on to explain the other factors also supporting trial of the Canadian infringement claim in Canada. *Id.* at 646-47.

In *Mizokami Bros. of Arizona, Inc.* v. *Baychem Corp.*, 556 F.2d 975 (9 Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1035 (1978), the Ninth Circuit held that it was proper to dismiss on the ground of forum non conveniens, even though it resulted in an American plaintiff being sent to the Mexican courts for relief. The court, after stressing both the degree of discretion to be accorded the district court and the clear Mexican locus of events which lead to the litigation, concluded:

> "The plaintiff falls back on its United States citizenship as the sole and only possible basis for suing these defendants in a court of the United States. This is not enough. In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when

every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.

There was no abuse of discretion." *Id.* at 978.

Similarly, in *Mohr* v. *Allen*, 407 F.Supp. 483 (S.D.N.Y. 1976), the plaintiff was an American citizen who sued on the basis of a purported oral contract with a Mexican national to develop a hotel property in Mexico. Again, Mexico was the clear locus of events. Its law would govern the outcome of the action. Notwithstanding the citizenship of the plaintiff, the district court dismissed the action conditionally, resting its decision on forum non conveniens as an alternative ground.

(3) Plaintiff's Citizenship or Residence in Admiralty Law

What is true of the law of forum non conveniens generally—that citizenship or residence no longer are absolutely determinative factors—is reflected in recent developments in admiralty as well. For example, in *Texaco Trinidad, Inc.* v. *Astro Exito Navegacion S.A.*, 437 F.Supp. 331 (S.D.N.Y. 1977), a Delaware corporation had been organized to run a business in Trinidad. It sued foreign corporations in the Southern District of New York for damages to its dock in Trinidad. The court dismissed the action on the ground of forum non conveniens.

True, there is some dicta in a few earlier cases to the effect that an admiralty court should not dismiss an action by an American libelant on forum non conveniens grounds.[12] During the pre-*Gilbert* period, how-

12 The original underpinning for this view, as stated in some early cases (all, it so happens, in a single district court), was that the

ever, apparently no court had held, *on the facts of the case before it*, that it was improper to remit an American libelant to the courts of another country.[13] The instant case appears to be the first one to come before our Court involving an American libelant where the balance of conveniences sufficiently favored another forum to justify use of the doctrine.

This would suggest that the dicta in the earlier cases reflected, not some special rule where admiralty plaintiffs were involved, but the general rule for all forum non conveniens motions, as the rule was then understood. In other words, even a land-based forum non conveniens motion against a resident plaintiff would have been subject to the same observations. Such dicta clearly have been rendered obsolete by subsequent developments in the law, notably *Gilbert*. Thus, the lan-

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constitutional grant of jurisdiction to the federal courts in such cases ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction", U.S. CONST., art. III, § 2) required retention of every case. *The Epsom*, 227 F. 158 (W.D. Wash. 1915); *The Falls of Keltie*, 114 F. 357 (D. Wash. 1902); *Bolden* v. *Jensen*, 70 F. 505 (D. Wash. 1895).

There are obvious infirmities in this interpretation. One respected commentator has characterized it as a "dubious doctrine". Bickel, *supra*, at 43. *See John Fabick Tractor Co. v. Penelope Shipping Co.*, 278 F.Supp. 182, 183 (S.D.N.Y. 1967) (dictum). There are at least three problems with this approach. First, the same might be said with respect to the application of forum non conveniens to any case grounded upon federal jurisdiction—such as a diversity action. Second, it is inconsistent with the power of Congress to supervise the inferior federal courts. U.S. CONST., art. III, § 2. Third, the United States has signed treaties withdrawing from our courts jurisdiction over actions between American crew members and foreign ship masters. Such withdrawals of jurisdiction have been upheld. *The Albergen*, 223 F. 443 (S.D.Ga. 1915), and cases cited at 444-45;*The Welhaven*, 55 F. 80 (S.D.Ala. 1892); *The Burchard*, 42 F. 608 (S.D. Ala. 1890).

13 As a practical matter, the cases that would give rise to such a situation are rare. *Swift & Co. Packers* v. *Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 697 (1950); Braucher, *supra*, at 921.

guage of the pre-*Gilbert* cases should be viewed, not as an admiralty exception to what is now the *Gilbert* rule, but as expressions preceding *Gilbert* and antedating the modern liberal trend in forum non conveniens.

Moreover, the earlier cases often were more liberal than their dicta might indicate. For example, in *U.S. Merchants' & Shippers' Insurance Co.* v. *A/S Den Norske Afrika Og Australie Line*, 65 F.2d 392 (2 Cir. 1933) (L. Hand, J.), the Court spoke of a citizen's "absolute privilege of resort to its own courts, independ[ent] of any inconvenience to the respondent." *Id.* at 392. That dictum reflected the then generally held view, since rejected, that *citizenship* alone was a bar to dismissal on the ground of forum non conveniens by any court, state or federal. The holding of the case, however, was in accordance with the liberal trend in forum non conveniens. The Court upheld the district court's decision which sent a *United States* corporation to the courts of *Norway* to litigate its claim against a Norwegian ship owner.[14]

In the related area of enforcement of contractual choice of forum clauses which resulted in sending an American plaintiff to a foreign tribunal, this Court was a leader in the federal courts' movement away from the earlier parochial view that such clauses should not be honored. *E.g.*, *Wm. H. Muller & Co.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2 Cir.), *cert. denied*,

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14 The asserted justification for the Court's apparent departure from the "absolute privilege" was that the American libelant was acting in the place of a Dutch shipper. This rationale strikes us as unpersuasive, since the American underwriter already had paid the Dutch shipper's claim. The only interests left in the case were those of the American underwriter and the Norwegian ship owner. Nevertheless, the American plaintiff was sent to a foreign forum because the district judge thought that "the balance of convenience was greatly in favor of a Norwegian trial." 65 F.2d at 392.

350 U.S. 903 (1955). But *cf. Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200 (2 Cir. 1967) (en banc) (choice of forum clause held invalid in the specific context of § 3(8) of COGSA, 46 U.S.C. § 1303(8)). The movement away from the former narrow rule was vindicated by the Supreme Court in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972).[15]

IV.

Finally, we turn to the question upon which this appeal originally was argued and decided: whether, under *Gilbert*, Judge Conner's dismissal of the action on the ground of forum non conveniens was an abuse of discretion. We hold that it was not. Judge Conner's carefully considered opinion, 453 F.Supp. 10, constitutes, in our view, the best demonstration of his sound exercise of discretion.

The Supreme Court in *Gilbert* made it very clear that application of the doctrine of forum non conveniens left a large measure of discretion to the trial judge:

> "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which

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15 Referring to the *Bremen* decision, a commentator concluded:

> "As a result of this decision, and also of action taken at the state level to give greater flexibility to the doctrine of *forum non conveniens* [specifically, *Silver*], much progress has been made to liberalize American rules and make them more consistent with those prevailing in England and in many Continental countries, at least in respect of freely negotiated agreements." (footnotes omitted). DeLaume, *Choice of Forum Clauses and the American Forum Patriae, Something Happened on the Way to the Forum: Zapata and Silver*, 4 J. Mar. Law & Com. 295, 297 (1973).

> plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." 330 U.S. at 508 (footnote omitted).

The Court wisely declined to try to define an all-purpose rule. It did set forth the relevant factors to be taken into account. The Court thus necessarily placed heavy reliance on the discretion of the trial judge to balance those factors.

Restatement (Second) of Conflict of Laws § 84, Comment b (1971).

Even before *Gilbert*, the existence of this discretion, particularly in admiralty law, was well established. *E.g.*, *The Mandu*, 114 F.2d 361 (2 Cir.), *cert. denied*, 311 U.S. 715 (1940); Comment, Admiralty Suits Involving Foreigners, 31 Tex. L. Rev. 889, 889 n.5 (1953). And, as indicated above, it is a doctrine of continuing current force which we have reaffirmed repeatedly. *Farmanfarmaian* v. *Gulf Oil Corp.*, *supra*; *Schertenleib* v. *Traum*, *supra*; *Fitzgerald* v. *Texaco, Inc.*, *supra*; *Thomson* v. *Palmieri*, 355 F.2d 64 (2 Cir. 1966).

Appellant challenges the sufficiency of Judge Conner's finding that the Southern District is an inconvenient forum. It points out that, whereas in *Farmanfarmaian* nine months of discovery was permitted on the question of the appropriateness of the forum, Judge Conner rendered his decision based only on affidavits. This ignores the fact that the two cases are vastly different—*Farmanfarmaian* being a complex contract action, *Alcoa* a simple tort action involving damage to a pier. Moreover, it is the well established practice in the Southern District of New York to decide

such motions on affidavits. *Koster* v. *Lumbermens Mutual Casualty Co.*, *supra*, 330 U.S. at 531; *Vanity Fair Mills* v. *T. Eaton Co.*, *supra*, 234 F.2d at 645.

The primary concern of appellant in resisting trial in Trinidad is that it may recover only $570,000 rather than $8,000,000 from appellee, assuming the latter to have been at fault. Much is made by appellant of the supposed inequity of forcing it to Trinidad where it will be limited in its recovery to a lesser sum.[16] It is abundantly clear, however, that the prospect of a lesser recovery does not justify refusing to dismiss on the ground of forum non conveniens. *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932); *Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392, 1397 n.22 (2 Cir. 1976); *Kloeckner Reederei und Kohlenhandel, G.M.B.H. v. A/S Hakedal*, 210 F.2d 754, 757 (2 Cir.), appeal *dismissed by stipulation*, 348 U.S. 801 (1954). Moreover, it is not at all unfair for appellant to recover the lesser amount. Its pier was in Trinidad. It was not likely to go traveling. As long as it did not, Trinidad's damage limitation law governed. It would be far more unfair to impose an additional recovery against appellee when appellant, fully familiar with the law of the place where it maintained a permanent business, could have insured its additional risk in a prudent fashion. There is no reason to suppose that it has not done so.

16 There is no suggestion in the record that Trinidad is not an adequate forum. Appellee has submitted to the jurisdiction of the courts there and has offered a letter of guaranty that a judgment against it in Trinidad will be satisfied. Those are express conditions of the dismissal of the action. P. 4, *supra*. It would be another matter if Judge Conner had remitted Alcoa to a foreign court in a way that deprived it of security it otherwise would have had, *e.g.*, *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, *supra*, 339 U.S. at 697-98, or had remitted it to a judicial system wholly devoid of due process. This is not that case.

All in all, although perhaps not all of us would have reached the same result, we are satisfied that Judge Conner did not abuse his discretion in conditionally dismissing on the ground of forum non conveniens. We tried to list the factors upon which he relied, in our panel dissenting opinion of January 10, 1979, ____ F.2d at ____, slip op. at 5377-78:

> "The record established that the case involved an accident that occurred in Trinidad. The damage to Alcoa's pier was in Trinidad. Regardless of where the repair crews may come from, the repair work will take place in Trinidad. Apart from experts and the ship's crew, whatever witnesses may be called are in Trinidad. The alleged tortious conduct of defendant Norcross and the master of the Nordic Regent took place in Trinidad, as did the alleged negligent action on the part of the local pilots' association in Trinidad. The association may be involved and might be impleaded if the case is tried in Trinidad because the presence of a pilot on the Nordic Regent was required by the statute law of Trinidad and Tobago. The law of Trinidad and Tobago also presumably determines the duty of care owed by the various parties. Finally, the tides and currents around Trinidad may figure prominently in the trial of the case." (footnotes omitted).

"We conclude that under *Gilbert*, the judge used the correct standard in applying the doctrine of forum non conveniens and did not err in conditionally dismissing the action.

V.

To summarize, we hold that:

(1) The *Gilbert* standard, as reaffirmed in *Farmanfarmaian*, is the proper one for determining motions to dismiss on the ground of forum non conveniens, including those in admiralty actions.

(2) Neither the admiralty nature of an action nor the American citizenship of a plaintiff justifies creating a special rule of forum non conveniens.

(3) The district court in the instant case, in conditionally dismissing the action on the ground of forum non conveniens, did not abuse its discretion under the *Gilbert* standard.

As the Supreme Court said in another context:

> "Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices." *British Transport Commission v. United States*, 354 U.S. 129, 139 (1957).

Accordingly, the judgment and opinion of the panel on rehearing is vacated; the judgment of the district court is affirmed.

Affirmed.

Dissenting Opinion of Judge Oakes

OAKES, *Circuit Judge* (concurring in dissenting opinion):

I concur fully with Judge Van Graafeiland's well-reasoned opinion. I add these few words simply to reiterate the view suggested in my dissent in *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), that the "entire doctrine of *forum non conveniens* should . . . be reexamined in the light of the transportation revolution that has occurred since" *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), were decided.[1] There are several jets a day between New York and Trinidad to transport witnesses, documents, and lawyers if need be. It is totally unrealistic in my view to relegate these parties to trial in Trinidad.

As Judge Van Graafeiland points out, there is a basic interest of the United States in exercising jurisdiction to avoid a failure of justice, one that would occur here by virtue of the Trinidad limitation of liability. It is not at all chauvinistic to suggest that the avoidance of such a failure of justice has been a long-standing principle of American admiralty law dating back at least to *The Belgenland*, 114 U.S. 355, 368-69 (1885) (collision between Norwegian barque and Belgian steamship). *See Gkiafis v. S.S. Yiosonas*, 387

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1 In 1949 the late Alexander Bickel, referring to the "device" of forum non conveniens, said, "The device has been in use in admiralty in the United States for 150 years and more and has never received an overhauling. It needs one pretty badly." Bickel, *The Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty* [subtitled *An Object Lesson in Uncontrolled Discretion*], 35 Cornell L.Q. 12, 13 (1949).

Such an overhauling is even more necessary today; it still has not occurred.

F.2d 460, 462 (4th Cir. 1967) (Greek seamen suing Panamanian vessel); *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S*, 239 F.2d 463, 465 (5th Cir.), *cert. denied*, 353 U.S. 938 (1957) (suit against Norwegian vessel by various foreign nationals). American litigants are entitled to treatment at least as good as that accorded to the foreign litigants in these cases.

And a limitation upon or denial of recovery is in and of itself a ground for *not* dismissing on the basis of the forum non conveniens doctrine. Bickel, *The Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12, 28, 44, (1949). That doctrine, which is totally unrealistic in a case of this nature, involving these sums, is being applied here to wreak injustice on an individual litigant for no reason that makes any sense to me. The reference in the majority opinion to "court efficiency," majority op. at 6, rings very hollow: by what standard is "court efficiency" improved by dismissing this case? Is "court efficiency" a euphemism for something else? In this respect, perhaps, I am a little chauvinistic. American taxpayers, I think, have a certain basic right of access to American courts when the latter have jurisdiction—a right upon which judicially-made rules in the supposed interests of "court efficiency" should not unduly impinge.

Dissenting Opinion of Judge Von Graafeiland

VAN GRAAFEILAND, *Circuit Judge,* dissenting:

Liberia is a small country about the size of Ohio, located on the west coast of Africa. Its population of approximately 1.5 million people engages mostly in agricultural pursuits, and it has relatively little foreign trade. In 1976, Liberia's imports amounted to approximately $400 million and its exports approximately $457 million.[1] During that same year, however, the Liberian merchant fleet consisted of 2,666 ships totalling over 76 million gross registered tons, making it one of the largest single-flag fleets in the world.[2] Liberia is a "flag of convenience" country, and, by 1976, fleets registered in the principal flag of convenience countries represented 27.6 percent of the total world fleet.[3]

Ships such as the Nordic Regent register in flag of convenience countries because those countries subject them to little or no control. Fees and taxes are low, labor regulations and safety standards are minimal, and ship movements are largely unhampered.[4] One needs but little knowledge of American maritime law to appreciate the advantages that flag of convenience ships have over those in the heavily regulated merchant marine of the United States. *See Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 587 (1953).

To those advantages, this Court now adds another. Henceforth, these somewhat ersatz foreign nationals[5]

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1 *Statesman's Year-Book* 785 (1978).

2 *Id.* at 786.

3 Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 Am.J. Int'l L. 604, 608 n. 14 (1979).

4 *Id.* at 604, 615.

5 In Jones Act cases, this Court "[looks] through the facade of foreign registration" to the actual ownership behind it. *Bartholomew*

are to have the benefit of "liberal forum non conveniens rules" applied under "a more liberal dismissal standard" in accordance with "the modern liberal trend in forum non conveniens", pursuant to which an American plaintiff can be ousted from his Country's courts upon a simple balancing of conveniences as between the plaintiff and the defendant. Indeed, the defendants in the instant case have succeeded in having plaintiff's Southern District suit dismissed on the ground that dismissal will satisfy the convenience of essential witnesses, despite the fact that the record does not disclose the name and address of a single such witness or the substance of his anticipated testimony. Of course, defendants' failure to name their Trinidadian witnesses is not surprising considering that the Nordic Regent was manned by an Italian crew, its responsibility for the accident is clear, and plaintiff's damages are concededly in excess of $570,000, the top recovery permitted under Trinidad law. Dismissal of plaintiff's complaint under such circumstances is an unjustifiably extreme application of even "the more liberal dismissal standard" that our brothers now espouse.

By not insisting upon the identification of defendants' alleged witnesses and some indication of the testimony they are expected to give, our brothers have abandoned a well-established requirement of this Circuit and substituted a completely unacceptable standard in its place. Over a quarter of a century ago, Chief Judge Kaufman, than a district judge, said that "[t]he party seeking the transfer must clearly specify the key

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v. Universe Tank Ships, Inc., 263 F.2d 437, 442 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959). For a broader application of this practice, see *Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst*, 154 F. Supp. 886, 889 (S.D.N.Y. 1957).

witnesses to be called and must make a general statement of what their testimony will cover." *Jenkins v. Wilson Freight Forwarding Co.*, 104 F. Supp. 422, 424 (S.D.N.Y. 1952). This has been the required practice in this Circuit up to the present day.

> "When a party seeks the transfer on account of the convenience of witnesses under § 1494(a), he must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover." *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

Other courts of appeal are in accord. *See Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756-57 (3d Cir. 1973); *Chicago, R.I. & P.R.R. v. Hugh Breeding, Inc.*, 232 F.2d 584, 588 (10th Cir. 1956), *petition for cert. dismissed under Rule 60*, 355 U.S. 880 (1957); *Headrick v. Atchison, T. & S.F. Ry.*, 182 F.2d 305, 310-11 (10th Cir. 1950). Reputable form books have accepted this as the proper practice, *see, e.g.*, 1 *Nichols' Cyclopedia of Federal Procedure Forms* § 15.19 (2d ed. 1970), and numerous state courts concur. *see, e.g., Hurlbut v. Whalen*, 58 A.D.2d 311, 316, *motion for leave to appeal denied*, 43 N.Y.2d 643 (1977); *States Marine Lines v. Domingo*, 269 A.2d 223, 226 (Del. 1970). It is a salutary requirement designed to prevent injustice and facilitate appellate review. It should not now be discarded by this Court.

We do not dissent, however, solely because we find "The Tale of the Essential Witnesses" to be more fictional than factual. We are making law today for cases yet to come, and we are concerned about the casualness with which our brothers are prepared to oust American

litigants from American forums. We disagree with our colleagues' decision to weigh the criteria for deciding whether to send an American plaintiff to a foreign country on the same scale that would be used in deciding whether to send him to another state.

Justice Frankfurter once wisely observed that a court should not be ignorant as judges of what its members know as men. *Watts v. Indiana*, 338 U.S. 49, 52 (1949). As men, we know that we live in a troubled and turbulent world. As judges, we should view that world as it is, not as we would like it to be. "One World", a world united in peace, with "liberty and justice for all", has been the dream of men of good will for countless generations. However, instead of "One World", our planet today is divided into at least three "Worlds", and perhaps four or five.[6] The economic demands of the poorer countries and their nationalistic treatment of foreign investments are evidence to some of a "fissuring of planetary policy that is both wide and deep".[7] "[B]arriers of emnity and fear" divide many of this planet's inhabitants.[8] Armed conflict, terrorism, and rebellion vie for international headlines. American citizens are held hostage in American embassies. Stable governments and independent judiciaries are hardly universal phenomena.

Despite all this, our brothers assure us that nations today "are growing more closely linked by bonds of commerce and culture" and dismiss as parochial the oft-expressed reluctance of this Court and others to

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6 Oliver, *Legal Relations Among Legal Systems: Games, Pains, and Some Pending Problems*, 127 U. Pa. L. Rev. 909, 912-13 (1979).

7 *Id.* at 913-14.

8 R. Sterling, *Macropolitics: International Relations in a Global Society* 287 (1974).

deprive United States residents of the justice which they know will be fairly dispensed in their own courts.[9] Our brothers apparently feel that the condition of the world has improved so much since 1966 that we need no longer distinguish *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), as we did in *Thomson v. Palmieri*, 355 F.2d 64, 65-66 (1966), where we said that, in *Gulf Oil*, "there was no question of seeking a forum in a foreign state." The headlines in our daily newspapers leave us no choice but to disagree.[10] *Gulf Oil*, which involved an action in the Southern District of New York by a Virginia resident against a Pennsylvania corporation, is as distinguishable in the instant case as it was in *Thomson v. Palmieri*.

On the other hand, in *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1947), the Court said that a plaintiff "should not be deprived of the presumed advantages of his home jurisdiction except upon

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9 There are, of course, nations whose standards of justice are as high as those of the United States. However, the majority's holding, like Alexander Pushkin's gray-haired magistrate, "contemplates alike the just and the unjust." We do not presume to identify those countries falling within the latter category. Moreover, we think it would prejudice this country's foreign relations and place an intolerable burden of proof upon American litigants for courts to make this factual determination on a case-by-case, country-by-country basis. *See Menendez Rodriguez v. Pan American Life Ins. Co.*, 311 F.2d 429, 433 (5th Cir. 1962), *judgment vacated on other grounds*, 376 U.S. 779 (1964). Pending the millennium, it is better, we think, to adhere to the traditional doctrine that, in the absence of unusually extreme circumstances and manifest injustice, the American plaintiff's choice of his home forum should not be disturbed.

10 When a newsman returns from a foreign country with the report that its inhabitants are "blind drunk with their hatred of the U.S.", *see* U.S. News & World Report, January 28, 1980 at 32, this Court need not, indeed may not, accept it as an adjudicated fact. This does not mean, however, that we should ignore it and the countless other reports of a similar nature while we declare the traditional reluctance of American tribunals to oust American litigants from domestic forums to be exaggerated and obsolete.

a clear showing of facts which . . . establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent . . . ." That is the rule appellant asks this Court to apply. Appellant says, as this Court has also said, that the application of the rule is most appropriate where the alternative to a plaintiff's home jurisdiction is the court of a foreign state. *See Olympic Corp. v. Societe Generale*, 462 F.2d 376, 378 (2d Cir. 1972).

Appellant does not contend, as the majority seem to suggest, that American citizenship alone is a "barrier" to or "impenetrable shield" against dismissal on the ground of forum non conveniens. That is a man of straw argument. Appellant's argument, as illustrated by the following quotation from its brief, simply adopts the law as it has been expressed on numerous occasions by this Court.

> "As this court held in *Leasco Data Processing Equipment Corp. v. Maxwell,* 468 F.2d 1326, 1344 (2d Cir. 1972, Friendly, Feinberg and Davis, JJ.), even a balance of convenience in favor of trial abroad 'is not enough to justify a district court in dismissing the complaint of an American citizen, much less to warrant an appellate court's requiring it do so,' quoting with approval the decision in *Burt v. Isthmus Development Corp.*, 218 F.2d 353, 357 (5th Cir. 1955), *cert. denied*, 349 U.S. 922 (1955) that 'courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country.' " Appellants' Supplemental En Banc Brief at 21-22.

It was the Supreme Court in *Koster*, *supra*, not appellant, that established "oppressiveness and vexation" as the standard for measuring whether a defendant's inconvenience is sufficient to deprive the plaintiff of the right to litigate in his home forum. We followed this standard in *Thomson v. Palmieri*, *supra*, 355 F.2d at 66, where we said that "[t]he central question is one of convenience, and we should respect plaintiff's choice of forum as long as no harassment is intended." The Court of Appeals for the District of Columbia Circuit has done the same. *See Founding Church of Scientology v. Verlag*, 536 F.2d 429, 436 (D.C. Cir. 1976); *Altman v. Central of Ga. Ry.*, 363 F.2d 284, 286 (D.C. Cir.), *cert. denied*, 385 U.S. 920 (1966). So also have the Third Circuit, *see Hoffman v. Goberman*, 420 F.2d 423, 426-27 (3d Cir. 1970), and the Fifth Circuit, *see Burt v. Isthmus Development Co.*, 218 F.2d 353, 357-58 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955). Among the district court cases in accord are *Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa*, 428 F. Supp. 1237, 1253 (S.D.N.Y. 1977); *Detrick v. Baltimore & O.R.R.*, 330 F. Supp. 257, 259 (E.D. Pa. 1971); *McCarthy v. Canadian Nat'l Rys.*, 322 F. Supp. 1197, 1198-99 (D. Mass. 1971); *Fiorenza v. United States Steel Int'l, Ltd.*, 311 F. Supp. 117, 121 (S.D.N.Y. 1969).

The district court in the instant case, however, was content to rest its decision upon a balancing of conveniences, finding that defendant's inconvenience substantially outweighed plaintiff's and that the litigation "can be conducted most effectively and inexpensively in Trinidad."[11] We would reverse, because we think it bet-

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11 In *Leasco Data Processing Equipment Corp. v. Maxwell*, *supra*, 468 F.2d at 1344, after finding that the balance of convenience

ter to adhere to the traditional rule that simply balancing conveniences is not enough, when the result is to oust an American plaintiff from his Country's courts. We would continue to hold that, unless the inconvenience to the defendant is so great as to constitute vexation and harassment and result in manifest injustice, plaintiff's choiice of a domestic forum should not be distubed.

We disagree with the majority's contention that this Country's Treaties of Friendship, Commerce and Navigation compel a different result. These treaties provide in general for free "access" to United States courts, and the term "access" is usually defined to comprehend, among other things, access to legal aid and exemption from providing security for costs. *See*, *e.g.*, Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, [1961] 12 U.S.T. 908, 937, T.I.A.S. No. 4797; Treaty of Friendship, Commerce and Navigation, Aug. 3-Dec. 26, 1951, United States-Greece, [1954] 5 U.S.T. 1829, 1911, T.I.A.S. No. 3057. Article XVII of the Treaty of Friendship, Commerce and Navigation between the United States and Liberia, entered into force on November 21, 1939, provides that Liberian corporations and associations "shall enjoy free access to the courts of law and equity, on conform-

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favored a trial in England, this Court said "[b]ut that is not enough to justify a district court in dismissing the complaint of an American citizen . . . ." Similarly, in *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966), the Court said that the election of his home forum by a citizen of the United States "should not be disregarded in the absence of persuasive evidence that the rejection of juridiction will result in manifest injustice to the respondent." The Court then concluded, "This is so even though the more convenient forum may be the foreign one." *Id.* These statements of the law stand in marked contrast to those of the district court in the instant case.

ing to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law." *See* 54 Stat. 1739, 1746, T.S. No. 956.

No treaty requires that foreign nationals receive more favorable treatment in our courts than would an American litigant. *See* Note, *The Convenient Forum Abroad*, 20 Stan. L. Rev. 57, 65 (1967). If defendants were compelled to continue this litigation in the United States, they could hardly contend that their treatment was less favorable than that which would be accorded an American defendant or that they had lesser access to United States courts.

It is regrettable that our brothers refuse to give any extra consideration to an American plaintiff's choice of his home forum because they fear that Treaties of Friendship, Commerce and Navigation would require that similar consideration be given to a foreign plaintiff's choice of the same forum. It is a strange doctrine indeed that would deprive a citizen of legal rights because, otherwise, the same rights might have to be given to an alien.

In any event, there is no reason for the majority to fear that a rule contrary to the one they have adopted would require this Court to treat foreign plaintiffs as if they were residents of the Second Circuit. For venue purposes, residents of other states who bring suit in the Southern District of New York are not treated as if they were residents of New York. *See, e.g., Haase v. Mallenkrodt, Inc.*, 451 F. Supp. 889, 890-91 (S.D.N.Y. 1976); *Pesin v. Goldman, Sachs & Co.*, 397 F. Supp. 392, 394 (S.D.N.Y. 1975). Treaties of Friendship, Commerce and Navigation do not require that foreign nationals be given greater access to New York courts

than would be given to Texans or Californians. Those treaties are not violated, therefore, when the door of access that "revolves" for Liberians, "revolves" as well for Americans. In short, the grant of access has not eliminated the laws and doctrines of venue.[12]

In this age of jet transportation, where, as here, two reasonably affluent corporations are engaged in financially significant litigation, the convenience of a few witnesses should be a minor consideration. "[T]he deposing of witnesses abroad or bringing them to the United States is a relatively simple and inexpensive matter in a suit of this size." *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting), *cert. denied*, 423 U.S. 1052 (1976); *see* Note, *The Application of Forum Non Conveniens in Maritime Personal Injury Actions Brought by Foreign Seamen in Federal Courts*, 1 Hastings Int'l & Comp. L. Rev. 77, 97-99 (1978). The doctrine of forum non conveniens "was designed as an 'instrument of justice,'" *Williams v. Rogers v. Green Bay & W.R.R.*, 326 U.S. 549, 554 (1946) (quoting *Guaranty Trust Co.*, 288 U.S. 123, 151 (1933) (Cardozo, J., dissenting)), and courts should be concerned more with whether justice will be served by a change of venue than with whether one party or the

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12 Under the venue provisions of 28 U.S.C. § 1391(a) a resident of the Southern District of New York may be sued in any other district of the United States by a resident of that district. He may be sued by a non-resident alien only in the Southern District of New York or where the claim in suit arose. Under the majority's interpretation of the Treaties of Friendship, Commerce and Navigation, the non-resident alien should be able to sue the New York resident in any district in the United States; otherwise the residents of those districts have greater "access" to their courts than do the non-resident aliens. Obviously, this cannot be what the Treaty signatories had in mind.

other will save a few dollars in the preparation of his proof.[13]

Our review of the instant case has left us with an abiding concern that justice will be ill-served if this litigation is removed to Trinidad. Justice will continue to be ill-served if this Court, adopting a "they knew what they were getting into" approach, persists in ousting American litigants from American forums under the "liberal forum non conveniens rules" to which our brothers now express adherence.

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13 We are not so naive as to believe that the dispute between the parties on this appeal concerns the convenience of witnesses. This Court is really being asked to decide whether the defendants may reduce their obvious liability to the plaintiff by being given the benefit of Trinidad's limitation of liability statute. If this litigation is removed to Trinidad, the odds are overwhelming that not a single witness will be called; the case will be settled for about ten cents on the dollar of plaintiff's loss.

Court of Appeals Panel Opinion of January 10, 1979

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 826—September Term, 1977.

(Argued April 4, 1978 Decided August 31, 1978.)

(Petition for Rehearing filed
September 18, 1978 Decided October 30, 1978.)

(Opinion filed January 10, 1979.)

Docket No. 78-7054

ALCOA STEAMSHIP COMPANY, INC.,

Plaintiff-Appellant,

—v.—

M/V NORDIC REGENT, her boilers, tackle, machinery and other appurtenances *in rem,* and NORCROSS SHIPPING CO., INC., as her Owner, *in personam,*

Defendant-Appellee.

Before:

WATERMAN, TIMBERS and VAN GRAAFEILAND,
Circuit Judges.

Appellant's motion for rehearing following affirmance of district court's judgment dismissing complaint on ground of forum non conveniens having been granted and reconsideration had, order of affirmance withdrawn and judgment appealed from reversed.

J. WARD O'NEILL, New York, N.Y. (Haight, Gardner, Poor & Havens, New York, N.Y., Gordon W. Paulsen, Emil A. Kratovil, Jr., New York, N.Y., on the brief), *for Appellant Alcoa Steamship Company, Inc.*

HOLLIS M. WALKER, JR., New York, N.Y. (Joseph T. Stearns, David L. Linden, and Walker & Corsa, New York, N.Y., on the brief), *for Defendant-Appellee.*

FRANCIS M. O'REGAN, New York, N.Y. (Bigham Englar Jones & Houston, New York, N.Y.), *Attorneys for American Institute of Marine Underwriters, Amicus Curiae.*

VAN GRAAFEILAND, *Circuit Judge*:

We granted reargument because of appellant's contention that *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947), cited as authoritative precedent by both the district court and this Court,[1] does not, and should not, establish the correct standard for determining when American citizens should have access to their country's admiralty courts. Appellant argued also that our decision in this case conflicts with prior decisions of this Court. A thorough analysis of *Gulf Oil,* placed in its proper historical setting, convinced us that appellant's contentions had merit and that our holding should be re-examined.

1 After evaluating the factors found significant in *Gulf Oil,* the district court concluded that "the litigation of this case can be conducted most expeditiously and inexpensively in Trinidad." We affirmed, relying upon the district court's consideration of the relevant factors set forth in *Gulf Oil* and the district court's finding of a "significant imbalance" in favor of the defendant.

Long before *Gulf Oil,* there existed a well-recognized rule of law that a court possessing jurisdiction had to exercise it unless there were compelling reasons why it should not. *See, e.g., Kline* v. *Burke Construction Co.,* 260 U.S. 226, 234 (1922); *Chicot County* v. *Arkansas,* 148 U.S. 529, 534 (1893); *Cohens* v. *Virginia,* 19 U.S. 264, 403 (1821). This appears also to have been the law of England. *See* Gibb, *International Law of Jurisdiction,* 212-13 (1926), *cited in Williams* v. *Green Bay & W. R.R.,* 326 U.S. 549, 554 n.4 (1946). Article III, section 2 of the Constitution extends the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction," and Congress by its various enabling enactments has placed admiralty and maritime jurisdiction in the district courts. *See* 28 U.S.C. § 1333. Nonetheless, from an early date, district judges have exercised their discretion in deciding whether to accept jurisdiction in an admiralty suit between foreigners. *See Canada Malting Co.* v. *Paterson Steamships, Ltd.,* 285 U.S. 413, 421-23 (1932). However, the rule mandating retention of jurisdiction was generally followed where the plaintiff was an American citizen seeking vindication of his own rights.[2] *See Norwood* v. *Kirkpatrick,* 349 U.S. 29, 41-42 (1955) (Clark, J., dissenting); *The Neck,* 138 F. 144, 148 (W.D. Wash. 1905); *The Falls of Keltie,* 114 F. 357, 358 (N.D. Wash. 1902). An American plaintiff was seldom if ever deprived of the opportunity to seek

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2 This Court, among others, recognized the right of access to American admiralty courts by an American suing in his own right in those cases where it refused to extend the same right to the American subrogee or assignee of a foreign claimant. *The Mandu,* 102 F.2d 459, 462 (2d Cir. 1939); *United States Merchants' & Shippers' Ins. Co.* v. *A/S Den Norske Afrika O.' Australie Line,* 65 F.2d 392, 393 (2d Cir. 1933); *see Asiatic Petroleum Corp.* v. *Italia Societa Anonima Di Navigazione,* 119 F.2d 610, 613 (3rd Cir. 1941); *Wittig* v. *Canada S.S. Lines, Ltd.,* 59 F.2d 428, 430 (W.D.N.Y. 1932); *Goldman* v. *Furness, Withy & Co.,* 101 F. 467, 468 (S.D.N.Y. 1900).

justice in the courts of his own country. *See Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 697 (1950); Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 921 (1947). Outside the field of admiralty law, even in cases where dismissal would not deprive the plaintiff of an American forum, it was generally assumed that a plaintiff had an absolute right of access to the courts of his place of residence. *See Norwood* v. *Kirkpatrick, supra*, 349 U.S. at 41 (Clark, J., dissenting); Barrett, *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 390 (1947).

This, then, was the general state of the law when *Gulf Oil* was decided. Because that case was a common law negligence action brought in the Southern District of New York by a Virginia resident against a Pennsylvania corporation, the Court did not undertake to modify the settled practice of giving favored jurisdictional treatment to resident plaintiffs. The Court's citation of *Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, 235 N.Y. 152 (1923), which held that New York courts could not refuse to exercise jurisdiction in a tort action by a resident against a non-resident, demonstrated the Court's recognition of the fact that, as of that date, forum non conveniens was applied generally to non-resident plaintiffs. This was demonstrated further by the Court's statements that "the principle of *forum non conveniens* is simply that a court may resist *imposition* upon its jurisdiction" and that "the *open door* may admit those who seek not simply justice but perhaps justice blended with some harassment." 330 U.S. at 507 (emphasis added). In short, *Gulf Oil* dealt with a situation in which the plaintiff was a non-resident, and the Court's holding should be considered in this light.[3]

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3 It is clear from the Court's subsequent opinion in *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A., supra*, 339 U.S. at

On the same day that the Court decided *Gulf Oil* it also decided *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947). This case had also been dismissed below on the ground of forum non conveniens. It was a derivative action brought in the Eastern District of New York by a policyholder of the nominal corporate defendant against the corporation's president and others. The plaintiff was a resident of the Eastern District of New York and the defendants were all domiciled in Illinois. Because of the peculiar nature of derivative actions the Court affirmed the dismissal of the New York action, stating that the plaintiff was only one of "hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts" and therefore the balance of conveniences indicated that it would be proper to have this case tried in Illinois rather than in the Eastern District of New York.

While so stating and so ruling, the Court observed, however, in an observation pertinent to the case before us that "[w]here there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice", and that plaintiff should not be deprived of his choice except upon a clear showing of such oppressiveness and vexation to the defendant as to be out of all proportion to plaintiff's convenience. *Id.* at 524.

This Court should look to the reasoning of *Koster*, rather than of *Gulf Oil*, in determining the rights of a resident plaintiff. *See Swift & Co. Packers* v. *Compania Colombiana*

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697 (1950), that it did not consider *Gulf Oil* to have answered the question whether United States admiralty courts might decline jurisdiction over libels brought by United States citizens.

Del Caribe, S.A., supra, 339 U.S. at 697. Moreover, where dismissal of plaintiff's suit will relegate him to litigation in the courts of a foreign country, the *Koster* standards should be strictly applied. That is the course which this Court and other circuits have followed. Before a resident citizen suing in his own right will be dispatched to the courts of a foreign country, there must be positive evidence of unusually extreme circumstances making it materially unjust to the defendant that jurisdiction be retained in the American courts. *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326, 1344 (2d Cir. 1972); *Mobil Tankers Co., S.A.* v. *Mene Grande Oil Co.,* 363 F.2d 611, 614 (3d Cir.), *cert. denied,* 385 U.S. 945 (1966); *Burt* v. *Isthmus Development Co.,* 218 F.2d 353, 357 (5th Cir.), *cert. denied,* 349 U.S. 922 (1955). Inconvenience to the defendant will not satisfy this criterion without a further showing of an intent by the plaintiff to vex or harass. *Thomson* v. *Palmieri,* 355 F.2d 64, 66 (2d Cir. 1966); *Founding Church of Scientology* v. *Verlag,* 536 F.2d 429, 436 (D.C. Cir. 1976); *Hoffman* v. *Goberman,* 420 F.2d 423, 426 (3rd Cir. 1970); *Altman* v. *Central of Georgia R. Co.,* 363 F.2d 284, 286 (D.C. Cir.), *cert. denied,* 385 U.S. 920 (1966); *Mobil Tankers Co., S.A.* v. *Mene Grande Oil Co., supra,* 363 F.2d at 614. As this Court stated in *Thomson* v. *Palmieri, supra,* 355 F.2d at 66, "we should respect plaintiff's choice of forum as long as no harassment is intended." *See Top Form Mills, Inc.* v. *Sociedad Nationale Industria Applicazioni Viscosa,* 428 F. Supp. 1237, 1253 (S.D.N.Y. 1977).

Suit in an American court could not have come as a surprise to defendant. When defendant accepted the benefits attending the use of American port facilities, it must

have been familiar with the age-old maritime tradition that gives libelants in rem jurisdiction where the vessel is found. *See Kloeckner Reederei Und Kohlenhandel* v. *A/S Hakedal,* 210 F.2d 754, 756 (2d Cir.), *appeal dismissed per stipulation,* 348 U.S. 801 (1954); *Motor Distributors, Ltd.* v. *Olaf Pedersen's Rederi A/S,* 239 F.2d 463, 467 (5th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957); *cf.* Article I(1)(b) of the Brussels Convention of 1952. Even if plaintiff were a foreigner, defendant would not have been entitled to dismissal of the district court suit unless it established that otherwise it would be unfairly prejudiced. *Kloeckner Reederei Und Kohlenhandel* v. *A/S Hakedal, supra,* 210 F.2d at 756. Plaintiff is in fact a United States citizen, and its choice of a local forum is entitled therefore to greater consideration than if it were made by a non-resident alien. *Swift & Co. Packers* v. *Compania, Colombiana Del Caribe, S.A., supra,* 339 U.S. at 697. American courts "are maintained to give redress primarily to their own citizens." *United States Merchants' & Shippers' Ins. Co.* v. *A/S Den Norske Afrika Og Australie Line, supra,* 65 F.2d at 392; *see Burt* v. *Isthmus Development Co., supra,* 218 F.2d at 356. They should consider the convenience of American citizens, whose taxes keep the courts in existence. *Douglas* v. *New York, N.H. & H. R.R.,* 279 U.S. 377, 387 (1929).

In the instant case, appellant's convenience will be served by suit in the United States because its damaged dock is being repaired by a United States contractor under the supervision of appellant's United States employees. This was sufficient to negate any charge of vexation, oppression, or harassment, and the district court made no finding that appellant had any such intention. The district court's weighing-of-inconveniences test, which led it to conclude that the litigation could be conducted "most expeditiously

and inexpensively in Trinidad", was an improper basis for dismissal.

Upon reconsideration, the judgment appealed from is reversed.

TIMBERS, *Circuit Judge,* dissenting:

Until today's majority decision on a petition for rehearing addressed to the panel, the issue throughout this litigation in this Court has been whether the district court *abused its discretion,* within the meaning of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508 (1947), in dismissing the action on the ground of forum non conveniens. That was the issue which was fully briefed and argued before us on April 4, 1978. That was the issue to which all three opinions were addressed in our 2-1 panel decision of August 31, 1978 affirming the district court's *exercise of discretion.* —— F.2d —— (2 Cir. 1978), slip op. 4587 (August 31, 1978).[1]

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1 In view of the sputtering course this case has taken in our Court, I think it is important briefly to recount the proceedings here for their bearing on the central issue of whether the district court abused its discretion.

The majority refers to the "order of affirmance" which it has withdrawn. It is true that the *proposed* order of affirmance, holding that the district court *did not abuse its discretion* in dismissing on the ground of forum non conveniens, was withdrawn to permit a dissenting opinion to be filed.

Eventually a short one page majority opinion was filed on August 31, 1978 affirming on the ground that "the district court *did not abuse its discretion*" (Timbers, J.). Slip op. 4587, at 4588. An even shorter concurring opinion was filed at the same time which concluded, "I cannot hold with my dissenting colleague that Judge Conner *abused the discretion vested in him* to exercise and that we should in this case reverse the order below on the ground of such an abuse." (Waterman, J.). *Id.* at 4589. A dissenting opinion also was filed, stating, "Because I believe that the district court *abused its discretion* in dis-

Now on a petition for rehearing—after the most cursory briefing[2] and no oral argument at all—the present majority holds for the first time that the *Gulf Oil* standard "does not, and should not, establish the correct standard for determining when American citizens should have access to their country's admiralty courts." —— F.2d at ——. The majority then proceeds to carve out for those litigants who invoke the admiralty and maritime jurisdiction of the federal courts an *absolute immunity* from dismissal on the ground of forum non conveniens—no matter how conclusively the long recognized balancing factors may point toward another more appropriate forum. This special privilege which the majority creates in the courts of the United States in favor of one class of litigants—chiefly, marine insurance underwriters[3]—not only is unprec-

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missing, I can not concur in my brothers' decision to affirm." (Van Graafeiland, J.). *Id.* at 4590. (emphasis added).

There followed a petition for rehearing, see note 2 *infra*, to which today's majority and dissenting opinions are addressed.

2 Alcoa's petition for rehearing, submitted late and in excess of the length provided for by our rules, nevertheless was accepted by an order of our Court dated September 18, 1978. After deciding that Norcross Shipping Co., Inc., the appellee, should be permitted to respond to the petition for rehearing, Norcross on September 21 was granted until September 27—*4 business days*—to get in its answering papers.

Three weeks later, on October 16, an amicus brief supporting the petition for rehearing was filed by the American Institute of Marine Underwriters (AIMU). This amicus brief appears to have provided substantial support for today's majority opinion, particularly for its rejection of the *Gulf Oil* exercise of discretion standard.

No opportunity was afforded to appellee Norcross to respond to the AIMU amicus brief, despite the majority's significant change of the ground of its decision.

As is customary in our Court, no oral argument was heard on the petition for rehearing.

3 See AIMU amicus brief, pages 1-2:

"In filing this brief *amicus curiae* AIMU is acting in support of the American marine insurance market."

* * *

[*footnote continued on following page*]

edented; it strikes a blow at our most precious heritage of equal justice for all. I dissent.

I.

I do not believe that in the courts of the United States the American residence of a plaintiff is, or should be, an inflexible barrier to dismissal on the ground of forum non conveniens when all the other indicia of an appropriate forum are lacking.

The *power* of a federal court to decline to exercise its jurisdiction in an appropriate case in reliance on the doctrine of forum non conveniens has been recognized since the earliest days of the Republic. *See, e.g., Gulf Oil Corp., supra.* It extends to admiralty as well as to all other fields of law. *Canada Malting Co.* v. *Peterson Steamships, Ltd.*, 285 U.S. 413, 421-23 (1932).

The doctrine of forum non conveniens is not a neat divider, like a fence, which separates the cases where jurisdiction should be retained from those where it should not. Instead, it meanders, like a river; and as a river with time may change its course by the erosion and build-up of its banks, so too the judge-made doctrine of forum non conveniens develops new twists and bends, shrinking and growing as it confronts novel factual situations. As the Supreme Court stated in the seminal forum non conveniens case:

> "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant

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"[AIMU] is a national trade association of 122 insurance companies. . . ." *Id.* at 1.

* * *

"AIMU's member companies underwrite more than 90% of the marine insurance written in the United States. . . ." *Id.* at 1.

> or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." (footnote omitted) *Gulf Oil, supra,* 330 U.S. at 508.

While the Court eschewed a bright line rule for the doctrine, it did enunciate the factors to be considered in applying it: ease of access to sources of proof; availability of compulsory process for unwilling witnesses; the cost of obtaining attendance of willing ones; the opportunity to view the premises; the need for application of an unfamiliar foreign law; and others.[4] The evaluation and balancing of these factors is a factual matter necessarily committed to the judgment of the district court. *See* Restatement (Second) of Conflict of Laws §84, Comment b (1971). Its determination should not be set aside lightly.

Here, that determination was based on a record consisting chiefly of affidavits—a procedure long recognized as acceptable and the procedure followed from time immemorial in the Southern District of New York. *See, e.g., Koster* v. *Lumbermans Mutual Casualty Co.,* 330 U.S. 518, 531 (1947); *Vanity Fair Mills* v. *T. Eaton Co.,* 234 F.2d 633, 645 (2 Cir.), *cert. denied,* 352 U.S. 871 (1956). The record established that the case involved an accident that occurred in Trinidad. The damage to Alcoa's pier was in Trinidad. Regardless of where the repair crews may come

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4 While the majority correctly urges that we consider "the convenience of American citizens, whose taxes keep the courts in existence," I suggest by the same token that we not overlook the convenience of the courts: "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin." *Gulf Oil, supra,* 330 U.S. at 508. Clogged courts are costly for taxpayers and litigants in terms of time as well as taxes.

from, the repair work will take place in Trinidad. Apart from experts and the ship's crew, whatever witnesses may be called are in Trinidad. The alleged tortious conduct of defendant Norcross and the master of the Nordic Regent took place in Trinidad, as did the alleged negligent action on the part of the local pilots' association in Trinidad. The association may be involved and might be impleaded if the case is tried in Trinidad because the presence of a pilot on the Nordic Regent was required by the statute law of Trinidad and Tobago. The law of Trinidad and Tobago also presumably determines the duty of care owed by the various parties.[5] Finally, the tides and currents around Trinidad may figure prominently in the trial of the case. Under these circumstances, I fail to see any abuse of discretion whatsoever on the part of Judge Conner in dismissing on the ground of forum non conveniens,[6] since clearly this is a case that should be tried in Trinidad, where the accident occurred, the damage exists, the witnesses will be found, and whose law will apply.[7]

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5 *See* Restatement (Second) of Conflict of Laws §147 (1971). The problem of *Buchanan* v. *Rucker*, 9 East 192 (K.B. 1808), "Can the island of Tobago pass a law to bind the rights of the whole world?" (per Lord Ellenborough, C.J.) is thus not posed.

6 As a result of the majority's shifting of the ground of its decision, thus abandoning the exercise of discretion standard, we seem to have lost sight of Judge Conner's thoughtful, concise opinion which carefully balanced the factors that should be considered in applying the doctrine of forum non conveniens under *Gulf Oil*—which everyone, including Judge Conner, thought was controlling until today's majority decision.

Judge Conner's excellent district court opinion, which has been reported at 453 F.Supp. 10 (S.D.N.Y. 1978), is annexed to this dissenting opinion as an APPENDIX.

7 The instant case is strikingly similar to *Texaco Trinidad* v. *Astro Evito Navegacion, S.A.*, 437 F.Supp. 331 (S.D.N.Y. 1977), where a maritime action was dismissed on the ground of forum non conveniens.

II.

This case is said to be different, however, because plaintiff Alcoa is a New York corporation and commenced this action in the Southern District of New York. It is true that our courts have been more solicitous of opposition to a forum non conveniens dismissal motion when its grant will force a United States citizen to a foreign forum for its day in court. *Olympic Corp.* v. *Societe Generale,* 462 F.2d 376, 378 (2 Cir. 1972); *Vanity Fair Mills* v. *T. Eaton Co., supra,* 234 F.2d at 645.[8] But that is not to say that American residence gives a plaintiff an *absolute* right to be in the federal court, without regard to the circumstances of the particular case. 15 Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction §3828, at 180 nn. 16-17 (1976); *see Vanity Fair Mills* v. *T. Eaton Co., supra,* 234 F.2d at 645 (trademark infringement).

Only recently we have acknowledged that, while there is "some support" for the proposition that "our courts should be quite cautious in dismissing on forum non conveniens grounds when suit is brought by an American citizen," forum non conveniens dismissal still may be appropriate. *Farmanfarmaian* v. *Gulf Oil Corp.,* —— F.2d ——, —— (2 Cir. 1978), slip op. 703, 708 (Dec. 18, 1978) (Feinberg, J.).[9] In that case, an Iranian citizen sued for breach of a

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8 Although we followed the *Vanity Fair* standard in *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326, 1344 (2 Cir. 1972), it should be noted that Judge Friendly recognized that the forum non conveniens issue was not among those certified by the district court and therefore the issue "technically . . . may not be before us." 468 F.2d at 1344.

9 Until today's majority opinion, *Gulf Oil* has been followed without deviation by our Court in a long line of decisions right down to the present time. In addition to *Farmanfarmaian, supra, see also Schertenleib* v. *Traum,* —— F.2d ——, —— (1978), slip op. 661, 667-70, 678-81 (Dec. 15, 1978) (Feinberg, J.).

contract between him and an Iranian subsidiary of various American and European oil companies. The contract was entered into in Iran. It involved an option to purchase an Iranian company. Evidence relating to the breach, and particularly the role of the Iranian government, was to be found in Iran. Iranian law was to govern. Although the plaintiff was a foreign national, we recognized that, under bilateral treaties between the United States and Iran, he was entitled to access to the United States courts on a basis "no less favorable" than that available to Americans, and therefore should enjoy the same consideration as a domestic plaintiff in resisting a forum non conveniens dismissal. We nevertheless affirmed Judge Carter's conditional forum non conveniens dismissal, thus allowing the action to proceed in Iran and noting that Judge Carter had "applied the same forum non conveniens standards as would be applied were the plaintiff an American citizen." *Id.*, at 708. It follows, if our most recent holding means anything, that American residence is not an impenetrable shield against dismissal on grounds of forum non conveniens.

Indeed, in view of the statutory codification of the doctrine which permits transfer of an action from one district court to another essentially on grounds of forum non conveniens, 28 U.S.C. §1404 (1976), the result of guaranteeing an American forum in admiralty cases where there is an American plaintiff would be to strip the doctrine virtually to a state of total ineffectiveness, since one of the few areas where it is still needed is where a foreigner and an American are involved in a maritime accident abroad and the accident has no nexus whatsoever to the district where the American party chooses to commence the action. I think it would be a grave mistake to write such a talismanic approach into a part of the law intended to promote the

courts' flexibility.[10] *Cf.* 7B Moore's Federal Practice ¶1404, at JC-601 (1977) (discussing 28 U.S.C. §1404). Moreover, the trend of the common law would appear to be away from such a view. While Mr. Justice Clark in 1955 could find but a single jurisdiction—Scotland—which allowed a forum non conveniens type of dismissal against a resident plaintiff, *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 33 (1955) (Clark, J., dissenting), many jurisdictions do so now. One of the most dramatic shifts is that of the State of New York as reflected in *Silver* v. *Great American Insurance*

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10 In *Silver* v. *Great American Insurance Co.*, 29 N.Y.2d 356, 361, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398, 403 (1972), Chief Judge Fuld put it this way:

"Although such residence [of one of the parties] is, of course, an important factor to be considered, *forum non conveniens* relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties. The great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation."

Especially when corporate citizenship is involved, the claim to an absolute right to sue in the home forum must be scrutinized with special skepticism. As the Supreme Court stated in *Koster*:

"Place of corporate domicile . . . might be entitled to little consideration under the doctrine of *forum non conveniens*, which resists formalization and looks to the realities that make for doing justice." *Koster* v. *Lumbermans Mutual Casualty Co.*, *supra*, 330 U.S. at 528.

While I recognize that Alcoa's link to New York is a substantial one, unlike the purely pro forma sort the Supreme Court worried might occur under modern corporate laws, *id.*; *see, e.g.*, *Texaco Trinidad* v. *Astro Exito Navegacion, S.A.*, *supra*, 437 F.Supp. at 333-34, it is not without significance that the particular Alcoa operation here involved appears to have been centered in Trinidad. While it may not come as a surprise to Norcross to be sued in New York, as the majority points out, where it has a general agent, it most assuredly can be no surprise to Alcoa that Trinidad law may limit its recovery to $570,000. Being a prudent corporation, it either has, or easily could have had, adequate insurance to cover such additional risk.

Co., supra. Finally, the Supreme Court never has considered local residence a guarantee of a local forum in all matters. *See, e.g., Koster* v. *Lumbermans Mutual Casualty Co., supra,* 330 U.S. at 525.

III.

The question therefore boils down to whether, in the instant case, sufficient prejudice has been shown to overcome the admittedly high barrier to transferring an action by an American citizen to a foreign forum for trial. *See* Restatement (Second) of Conflict of Laws §84, Comment f (1971). The point is not whether we as trial judges would have reached the same conclusion.[11] The point is that Judge Conner held, upon balancing the relevant factors, that dismissal on the ground of forum non conveniens was warranted. I am not persuaded that in doing so he abused his discretion so as to warrant reversal as a matter of law.

Neither *Koster* v. *Lumbermans Mutual Casualty Co., supra,* nor *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950), compels reversal. Although the Court in *Koster* set a high standard for dismissal in a resident plaintiff situation, 330 U.S. at 524, the outcome of the case nevertheless was to dismiss a New York plaintiff from the New York federal courts. In *Swift* the Court recognized that a forum non conveniens motion against a resident plaintiff in an admiralty suit "brings into force considerations very different" from those in all-foreigner suits. 339 U.S. at 697. But it reversed and remanded not merely because "[t]he District Court gave no indication that it recognized such considerations," *id.*, or because "[i]ts opinion indicates that in so far as it may

11 See Judge Waterman's concurring opinion of August 31, 1978 in the instant case. —— F.2d at ——, slip op. at 4589.

have exercised discretion to decline jurisdiction *it was moved to do so by its view that such jurisdiction does not exist.*" *Id.* (emphasis added). The essential holding of the Court in *Swift* was that it was improper to send the American plaintiff to a foreign forum deprived of the security it would otherwise enjoy and without an assurance that the defendant would appear. It reversed on those grounds. In the instant case, neither consideration has any bearing, as Judge Conner's findings make abundantly clear. See Appendix to this opinion, at 7-8.

Finally, the fact that Trinidad law may limit the damages recoverable by Alcoa does not mean that it would be stripped of any remedy by the application of the doctrine of forum non conveniens. It is well settled that a different law of damages is an insufficient basis for avoiding such a dismissal. The facts in *Canada Malting Co.* v. *Peterson Steamships, Ltd., supra,* involved such a situation; so did *Kloeckner Reederei und Kohlenhandel* v. *A/S Hakedal,* 210 F.2d 754, 757 (2 Cir.), *appeal dismissed by stipulation,* 348 U.S. 801 (1954).

Accordingly, I would reaffirm our prior decision in this case, —— F.2d —— (2 Cir. 1978), slip op. 4587 (August 31, 1978), which in turn affirmed the district court's exercise of discretion in dismissing this action on the ground of forum non conveniens. From the majority's refusal to do so, I respectfully dissent.

Court of Appeals Panel Opinion of August 31, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 826—September Term, 1977.

(Argued April 4, 1978 Decided August 31, 1978.)

Docket No. 78-7054

ALCOA STEAMSHIP COMPANY, INC.,

Plaintiff-Appellant,

—v.—

M/V NORDIC REGENT, her boilers, tackle, machinery and other appurtenances *in rem,* and NORCROSS SHIPPING CO., INC., as her Owner, *in personam,*

Defendant-Appellee.

Before:

WATERMAN, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appeal from judgment entered in the Southern District of New York, William C. Conner, *District Judge,* which dismissed action on ground of forum non conveniens.

Affirmed.

J. WARD O'NEILL, New York, N.Y. (Haight, Gardner, Poor & Havens, New York, N.Y., Gordon W. Paulsen, and Emil A. Kratovil, Jr., New York, N.Y., on the brief), *for plaintiff-appellant Alcoa Steamship Company, Inc.*

HOLLIS M. WALKER, JR., New York, N.Y. (Joseph T. Stearns, David L. Linden, and Walker & Corsa, New York, N.Y., on the brief), *for defendant-appellee Norcross Shipping Co., Inc.*

TIMBERS, *Circuit Judge:*

In this action commenced by Alcoa Steamship Company in the Southern District of New York to recover damages from Norcross Shipping Co., Inc. sustained as the result of a collision in Trinidad between Alcoa's vessel and Norcross' pier, the sole issue is whether the district court abused its discretion in granting Norcross' motion to dismiss the action on the ground of forum non conveniens.

After carefully weighing the relevant factors set forth in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947), the district court found that Norcross would be unduly inconvenienced in many respects and perhaps denied an opportunity to vindicate its legal claims against the Pilots' Association if the case were tried in New York. The district court found this imbalance to be significant enough to overcome the usual reluctance of courts in this Circuit to apply the doctrine of forum non conveniens when it would force an American to bring an action outside the United States.

We hold that it was within the district court's discretion to dismiss on the grounds of forum non conveniens under the circumstances of this case, and that the district court did not abuse its discretion in doing so. We affirm substantially for the reasons set forth in Judge Conner's opinion of January 17, 1978. —— F.Supp. ——.

Affirmed.

Concurring Opinion of Judge Waterman

WATERMAN, *J.*, concurring:

I concur in affirming the grant by the district judge of the defendant's motion to dismiss the complaint on the ground of forum non conveniens. I do so with great reluctance for the position taken by my dissenting colleague is an extremely convincing one. Moreover, if I had been the district judge I could well have arrived at an opposite result to the result reached below. Although I am unimpressed with the thought that "the inability to implead the pilot association . . . may seriously prejudice the defendant" and is of importance in deciding the motion, the opinion below is well reasoned and the precedents satisfactorily treated. Hence, although I do not fully join in the affirmance substantially on the opinion below, I cannot hold with my dissenting colleague that Judge Conner abused the discretion vested in him to exercise and that we should in this case reverse the order below on the ground of such an abuse.

VAN GRAAFEILAND, *Circuit Judge,* dissenting:

Appellant, Alcoa, is a New York corporation with its main office and principal place of business in New York City. It transports ore and other bulk cargoes by sea, and charters the vessels required for this purpose. It also owns and operates a transfer station ore pier at Point Tembladora, Trinidad.

Appellee, Norcross, a Liberian corporation, is the owner of the M/V Nordic Regent, one of the ships under charter to Alcoa. The ship's master, Giorgio Lissiani, and most of the members of its crew are Italian.

Shortly before midnight on January 2, 1977, the M/V Nordic Regent was approaching the harbor at Point Tembladora, which it was not permitted to enter without a

local pilot. Captain Lissiani was informed by radio that a pilot would meet him at a point about one-half mile from the harbor. However, the pilot had not yet arrived when the ship reached the point of rendezvous. Instead of waiting a few minutes for the pilot to come, Captain Lissiani barged, literally and figuratively, into the harbor without him and crashed his vessel into Alcoa's pier, doing damage estimated by Alcoa at $8,000,000.

Alcoa commenced this action in the Southern District of New York to recover for its loss, serving Norcross through its general agent in New York. Norcross moved to dismiss on *forum non conveniens* grounds, contending that the action should be tried in Trinidad, and its motion was granted. Because I believe that the district court abused its discretion in dismissing, I can not concur in my brothers' decision to affirm.[1]

It is the general rule that the doctrine of *forum non conveniens* should be applied only where "the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else." *Norwood* v. *Kirkpatrick,* 349 U.S. 29, 31 (1955) (quoting *All States Freight* v. *Modarelli,* 196 F.2d 1010, 1011 (3d Cir. 1952)). Where plaintiff resides in the district where the suit is brought, "[u]nder the usual *forum non conveniens* approach, this would virtually suffice, in and of itself, to preclude a refusal to retain the case for trial." *Id.* at 41, Clark, *J.,* dissenting.

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1 Because the district court's decision was based solely upon affidavits without oral testimony, this Court is in as good a position as was the district court to determine whether dismissal of plaintiff's action was warranted. We may therefore make a de novo review of the record to determine whether the district court's exercise of discretion was proper. *Medical Society of the State of New York* v. *Toia,* 560 F.2d 535, 537 (2d Cir. 1977); *San Filippo* v. *United Brotherhood of Carpenters and Joiners,* 525 F.2d 508, 511 (2d Cir. 1975); *Mobil Tankers Co. S.A.* v. *Mene Grande Oil Co.,* 363 F.2d 611, 613 (3rd Cir. 1966).

The foregoing rule takes on added significance where the party seeking dismissal argues for a trial in a foreign jurisdiction. Although the Supreme Court in *Swift & Company Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 697 (1950) left open the question of whether United States admiralty courts might decline jurisdiction over libels brought by United States citizens, we have held that an American citizen does not have the absolute right under all circumstances to sue in an American court. *Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956). In so holding, we stated, however, that we would be reluctant to deny a citizen this right. *Id.* at 646. Indeed, in *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972) (quoting *Burt* v. *Isthmus Development Co.*, 218 F.2d 353, 357 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955)), we said that "courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country." *See also Olympic Corp.* v. *Societe Generale*, 462 F.2d 376, 378 (2d Cir. 1972); *Volkswagen of America, Inc.* v. *S.S. Silver Isle*, 257 F. Supp. 562, 563-64 (N.D. Ohio 1966); *States Marine Lines, Inc.* v. *M/V Koku Maru*, 180 F.Supp. 255, 258 (N.D. Cal. 1960). I find no "unusually extreme circumstances" or manifest "material injustice" which justified dismissal of the instant action by the district court.

The district court placed great reliance upon the availability and convenience of witnesses in Trinidad. Assuming that witness inconvenience can be considered an "unusually extreme circumstance," [2] Norcross has not sustained

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2 This is probably an unwarranted assumption. *See States Marine Lines, Inc.* v. *M/V Koku Maru*, *supra*, 180 F. Supp. at 257-58; *Lesser* v. *Chevalier*, 138 F. Supp. 330, 331 (S.D.N.Y. 1956); *The Saudades*, 67 F. Supp. 820, 821 (E.D. Pa. 1946).

its burden of proving that this circumstance exists. A party seeking to transfer a case from one United States court to another for the convenience of witnesses must identify the key witnesses to be called and must make a general statement of what their testimony will cover. *Jenkins* v. *Wilson Freight Forwarding Co.*, 104 F.Supp. 422, 424 (S.D.N.Y. 1952). The burden is upon it to give the names and locations of potential witnesses and the substance of their testimony. *National Super Spuds* v. *New York Mercantile Exchange*, 425 F.Supp. 665, 668 (S.D.N.Y. 1977). Sufficient information must be included in its affidavits to establish that the named witnesses are key witnesses who need to be called and that their testimony is material. *Texas Gulf Sulphur Co.* v. *Ritter*, 371 F.2d 145, 148 (10th Cir. 1967); *Chicago, R.I. and Pac. R.R.* v. *Hugh Breeding, Inc.*, 232 F.2d 584, 588 (10th Cir. 1956); *Sinclair Oil Corp.* v. *Union Oil Co.*, 305 F.Supp. 903, 904 (S.D.N.Y. 1969); *Riso Kagaku Corp.* v. *A. B. Dick Co.*, 300 F.Supp. 1007, 1010 (S.D.N.Y. 1969); *Baksay* v. *Rensselaer Polytechnic Institute*, 281 F.Supp. 1007, 1010 (S.D. N.Y. 1968); *Polychrome Corp.* v. *Minnesota Mining and Manufacturing Co.*, 259 F.Supp. 330, 335 (S.D.N.Y. 1966); *Peyser* v. *General Motors Corp.*, 158 F.Supp. 526, 529-30 (S.D.N.Y. 1958); *National Tea Co.* v. *The Marseille*, 142 F.Supp. 415, 416 (S.D.N.Y. 1956); *Goodman* v. *Southern Ry.*, 99 F.Supp. 852, 855 (S.D.N.Y. 1951).

Surely, a defendant who seeks to deprive an American plaintiff of access to American courts must make at least as great a showing. As this Court has stated:

> "In any situation, the balance must be very strongly in favor of the defendant, before the plaintiff's choice of forum should be disturbed, . . . and the balance must be even stronger when the plaintiff is an American citizen and the alternative forum is a foreign one . . ."

Olympic Corporation v. *Societe Generale, supra,* 462 F.2d at 378.

Two short, almost cursory, affidavits of one of defendant's New York attorneys, with an attached affidavit of the ship's master, were the only papers submitted in support of defendant's motion to dismiss. With the possible exception of the master himself, these affidavits do not state the name of a single witness whom defendant intends to call nor what the testimony of any such witness will be. From the undisputed facts appearing in the record, it is difficult to believe that there are any witnesses whose testimony would exonerate Norcross from liability. When a moving vessel collides with a pier, the vessel is presumed to be at fault. *Brown & Root Marine Operators, Inc.* v. *Zapata Off-Shore Co.,* 377 F.2d 724, 726 (5th Cir. 1967). When the collision occurs because the ship's master violated local ordinances and proceeded into a strange harbor at night without waiting a few moments for the assistance of a compulsory pilot, the presumption of fault is, to say the least, strongly supported by the evidence. Conduct of this nature has been described with such terms as "imprudent," *American Union Transport Co.* v. *Aguadilla Terminal, Inc.,* 1962 A.M.C. 1151 (D.C.P.R. 1960), *aff'd in part, rev'd in part on other grounds,* 302 F.2d 394 (1st Cir. 1962); "folly," *Cargill Inc.* v. *Transamerican Steamship Corp. and American Union Transport, Inc.,* 1963 A.M.C. 264 (S.D.N.Y. 1962); "an exceedingly gross error in navigation and a decision of sheer lunacy," *Wilbur-Ellis Company* v. *M/V Captayannis S,* 306 F. Supp. 866, 869 (D. Or. 1969), *aff'd* 451 F.2d 973 (9th Cir. 1971), *cert. denied,* 405 U.S. 923 (1972); and lacking in "sound judgment and discretion," *The Framlington Court,* 69 F.2d 300, 307 (5th Cir.), *cert. denied,* 292 U.S. 651 (1934). Norcross has furnished the names of no witnesses who would describe Captain Lissiani's conduct differently.

Without setting forth the names or expected testimony of any witnesses who will be called to testify on the issue of damages, the affidavit of defendant's attorney states that testimony as to labor, material and services "obviously" will be available only in Trinidad. Despite the fact that no factual foundation whatever was laid for this conclusory statement, the district court found that repair witnesses were "concededly" residents of Trinidad. I find no such concession in appellant's answering affidavits. They show, on the contrary, that repairs to the pier will be performed by a United States general contractor under the supervision of Alcoa officials who reside in the United States.

In any event, the cost of repairs will of necessity be the subject of independent expert testimony, and the residence and convenience of expert witnesses is not a significant or controlling factor in determining the question of *forum non conveniens*. *Magnetic Engineering & Mfg. Co.* v. *Dings Magnetic Separator Co.*, 86 F.Supp. 13, 17 (S.D.N.Y.), *modified on other grounds and appeal dismissed as to transfer order*, 178 F.2d 866 (2d Cir. 1950); *see Herman* v. *Dough Frank Development Corp.*, 385 F.Supp. 767, 769 n.10 (S.D.N.Y. 1974); *Johnson* v. *Smith Meal Co.*, 160 F.Supp. 208, 209 (E.D.N.Y. 1958); *Nocona Leather Goods Co.* v. *A. G. Spalding & Bros., Inc.*, 159 F.Supp. 269, 271 n.3 (1958); *McCarley* v. *Foster-Milburn Co.*, 89 F.Supp. 643, 649 (W.D.N.Y. 1950).

In short, Norcross has made no showing that the convenience of witnesses justifies depriving Alcoa of its chosen forum in its American domicile. The district court's finding to the contrary is completely without support in the record.

The other factor relied upon by the district court in granting defendant's motion to dismiss was defendant's inability to implead the pilot association in the Southern

District of New York. Assuming that Norcross is sincere in its expressed intention of bringing a multi-million action against the pilot because he was not Johnny-on-the-spot at the rendezvous point, there is no compelling reason why this must be done by way of impleader. Norcross has not shown that the "vouching in" of the pilot in the present action would not give the judgment entered herein the same binding effect in Trinidad as it would have in the United States. *See, e.g., Robbins* v. *Chicago City,* 71 U.S. 657, 674-75 (1866); *Standard Oil Co.* v. *Robins Dry Dock & Repair Co.,* 25 F.2d 339, 340 (E.D.N.Y. 1928), *aff'd,* 32 F.2d 182 (2d Cir. 1929). Once defendant's liability and the amount of plaintiff's damages have been determined, the issues left for resolution as between defendant and the pilot could be disposed of in a very short and inexpensive trial. Under these circumstances, the inability of Norcross to implead the pilot, whose liability, at best, is questionable, should not extinguish plaintiff's right to have its claim passed upon by a United States court. *See Olympic Corp.* v. *Societe Generale, supra,* 462 F.2d at 379.

Although the granting of a motion to dismiss on the ground of *forum non conveniens* is within the district court's sound discretion, this discretion must be exercised "with regard to what is right and equitable under the circumstances and the law." *Mobil Tankers Co., S.A.* v. *Mene Grande Oil Co., supra,* 363 F.2d at 613 (citing *Langnes* v. *Green,* 282 U.S. 531, 541 (1931)). Before defendant's motion to dismiss may be granted, it must show that it would be unfairly prejudiced by a denial. *Kloeckner Reederei Und Kohlenhandel* v. *A/S Hakedal,* 210 F.2d 754, 756 (2d Cir.), *dismissed on appeal,* 348 U.S. 801 (1954). Here, the only prejudice shown in the record is that which will be sustained by the plaintiff.

Plaintiff's pier installation was damaged severely by defendant's ship through no fault of its own. The parties

are agreed that, if plaintiff is denied access to a United States court and is required to sue in Trinidad, its recovery will be limited under Trinidad laws to approximately $570,000.[3] Looking past the window dressing, it is obvious that this is the basic reason why Norcross is seeking a change of forum. It has accomplished this result simply by filing two completely inadequate affidavits executed by one of its New York attorneys. I cannot believe that the ends of justice are served when the defendant is permitted to take several million dollars out of the pockets of Alcoa and its shareholders on such a flimsy showing.

I would reverse.

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3 In weighing the prejudice to the plaintiff from removal to a foreign jurisdiction, I see little difference between the foreign jurisdiction's limitation on the time for suit or on the amount of recovery. The former precludes all recovery; the latter a substantial portion of it. It is well settled that an action will not be dismissed if the statute of limitation precludes suit in the proposed forum. *Norwood* v. *Kirkpatrick, supra*, 349 U.S. at 31; *Fletero* v. *Arias*, 206 F.2d 267, 270 (4th Cir. 1953); *All States Freight* v. *Modarelli, supra*, 196 F.2d at 1011. A substantial limitation on the amount of recovery should be treated in the same manner. *See Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 458 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 ('976) (Oakes, J., dissenting).

District Court Opinion

ALCOA STEAMSHIP COMPANY, INC.,
Plaintiff,

v.

M/V NORDIC REGENT, her boilers, tackle, etc. in rem, and Norcross Shipping Co., Inc., as her owner, in personam,
Defendant.

No. 77 Civ. 84 (WCC).
United States District Court, S. D. New York.
Jan. 17, 1978.

Pier owner brought action in rem against vessel and in personam against owner to recover for property damage sustained when vessel struck plaintiff's pier in Trinidad. Owner moved to dismiss on the grounds of forum non conveniens. The District Court, Conner, J., held that: (1) Trinidad was a more appropriate forum than New York, notwithstanding that plaintiff was a New York resident, where, among other things, dock workers, pilot personnel and repair witnesses were residents of Trinidad, defendant might be unable to implead pilot's association which allegedly was liable for the accident, and defendant agreed to submit to jurisdiction of Trinidad courts; (2) existence of in rem jurisdiction over vessel did not preclude dismissal; (3) plaintiff's interest in proceeding in New York to avoid limitation of defendant's liability under Trinidad law was insufficient to override considerations of convenience favoring defendant, and (4) existence of charter party agreement providing for litigation in New York did not mandate retention of jurisdiction where it referred only to disputes arising out of the charter.

Motion granted subject to reinstatement.

Haight, Gardner, Poor & Havens, New York City, for plaintiff; J. Ward O'Neill, Gordon W. Paulsen, Emil A. Kratovil, Jr., Edward J. Murphy, New York City, of counsel.

Walker & Corsa, New York City, for defendant; Hollis M. Walker, Jr., New York City, of counsel.

MEMORANDUM AND ORDER

CONNER, District Judge:

This is an action to recover property damages sustained as the result of an accident on January 2, 1977 when the M/V Nordic Regent struck a pier owned by plaintiff Alcoa Steamship Company, Inc. and located at Tembladora, Trinidad, West Indies. Presently before this Court is a motion by defendant, Norcross Shipping Co., Inc., owner of the M/V Nordic Regent, to dismiss the complaint on grounds of *forum non conveniens.*

The power of a federal court to decline to exercise jurisdiction where the litigation can more appropriately be conducted in a foreign tribunal was established in *Gulf Oil* v. *Gilbert,* 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), which sets forth the factors to be evaluated in deciding the instant motion. Concerning the private interest of the litigants, such factors include plaintiff's initial choice of forum; the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; questions as to the enforceability of a judgment; relative advantages and obstacles to a fair trial; and all other practical problems that make trial of a case easy, expeditious and inexpensive. From the standpoint of the public interest, the Court may consider administrative difficulties that follow from court congestion; a local interest in having localized controversies decided at home; and avoidance of unnecessary problems in conflicts of laws and in law foreign to the forum.

In support of its motion, defendant points to the lack of connection between any event in this case and the Southern District of New York; indeed, it argues, the only relationship between the controversy and this forum is that the plaintiff is a

New York corporation. Defendant contends that none of the witnesses on the issue of liability or damages resides in New York and that indeed most of the witnesses, including plaintiff's dock employees, non-party tugboat crew members, pilots and pilot station personnel, and defendant's witnesses on the cost of repairs to the pier, all reside in Trinidad and are not subject to process in New York; defendant also argues that it would be unable to implead the pilot's association—which it asserts may be liable for the accident—in this forum. Defendant further states that evidence relating to such factors as movement of tides, currents, winds and drafts is most accessible and can be more conveniently evaluated in Trinidad, and that a view of the pier may be necessary. Finally, defendant maintains that the courts of Trinidad are best equipped to apply the law of Trinidad, which defendant contends will govern this case.

In response, plaintiff points out that defendant is represented by a general agent, Anglo Nordic Shipping, Limited ("Anglo Nordic"), located in New York, and that on March 5, 1976 the M/V Nordic Regent and Anglo Nordic as her disponent or chartered owner entered into a charter party with plaintiff as charterer under which Anglo Nordic agreed to provide the services of the M/V Nordic Regent as an ore carrier. Plaintiff maintains that various terms of this agreement, including a stipulation that litigation arising out of the charter party may be conducted in New York and that New York law shall control such litigation make New York an appropriate if not mandatory forum for this litigation. Regardless of the applicability of the charter agreement, however, plaintiff argues that the facts of this case do not satisfy the requirement that "unless the balance [of convenience] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed," *Gulf Oil* v. *Gilbert, supra* at 508, 67 S. Ct. at 843, and contends that the balance must be even stronger when the plaintiff is an American citizen and the alternative forum is a foreign one. Plaintiff maintains that this forum is more convenient because the repair and recon-

struction of its Trinidad facility will be supervised by plaintiff's employees headquartered in Pittsburgh and carried out by an independent contractor located in New Orleans, Louisiana.*

Plaintiff also offers to bring its dock employees to New York for deposition and trial. Plaintiff further argues that both defendant and the crew of the vessel—which is predominantly Italian—would be as inconvenienced by a trial in Trinidad as in New York, since defendant is a "completely international operation" and the crew will either be at sea or in Italy. Finally, plaintiff maintains that its recovery may be substantially restricted under the applicable limitation of liability law of Trinidad.

This Court is persuaded that the lack of a substantial nexus between this controversy and the Southern District of New York combined with the inconvenience and possible prejudice to the defendant resulting from retention of jurisdiction here—which substantially outweigh any inconvenience plaintiff may suffer—renders this an inappropriate forum; an evaluation of the contentions of the parties compels the conclusion that the litigation of this case can be conducted most expeditiously and inexpensively in Trinidad.

The Court agrees with defendant that neither the charter party nor the presence of defendant's agent in New York increases plaintiff's interest in this forum or makes it more convenient or appropriate. Defendant maintains that it is not a party to the agreement and is not bound by its provisions. In

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* Plaintiff suggests that its acquisition of *in rem* jurisdiction over the M/V Nordic Regent further supports its opposition to dismissal. However, application of the doctrine of *forum non conveniens* would be virtually eliminated in admiralty cases if dismissal could be prevented by the existence of *in rem* jurisdiction, and in the absence of other factors outweighing a showing of substantial inconvenience to defendants, it can have no bearing on the instant motion. See *Continental Grain Co.* v. *Barge* FBL-585, 364 U. S. 19, 23, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960).

any event, the terms of the agreement providing for the conduct of litigation in the Southern District of New York and the applicability of New York law refer only to disputes "arising out of this Charter Party." The agreement between plaintiff and Anglo Nordic concerns such matters as specifications of the ship, duration of the charter, lawful cargo, etc.; none of its terms contemplates a dispute based on negligence unrelated to the defendant ship's function as carrier of plaintiff's cargo. Furthermore, plaintiff's complaint in this action is based entirely on negligence and does not allege a breach of the agreement. This Court therefore finds that the terms of the charter party cannot be construed to govern this case.

The presence of defendant's agent in New York may be relevant to the question of personal jurisdiction, but plaintiff has offered no reason why the agent's presence would make trial of this case more convenient for the defendant; it thus has no bearing on the instant motion.

Plaintiff's interest in proceeding here to avoid limitation of defendant's liability under Trinidad law is also insufficient to override considerations of convenience favoring the defendant. It is well established that a court may dismiss an action under the doctrine of *forum non conveniens* even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. See, *e.g.*, *Fitzgerald* v. *Texaco, Inc.*, 521 F. 2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U. S. 1025, 96 S. Ct. 781, 46 L. Ed. 2d 641 (1976).

Nor does plaintiff's asserted interest in the convenience of its expert witnesses weigh heavily, since they will have to travel some distance to trial regardless of its location. This is also true, of course, with respect to witnesses from the crew of the M/V Nordic Regent. On the whole, however, the availability and convenience of the witnesses militates most strongly toward dismissal in this case. The dock workers, pilot personnel and repair witnesses are concededly residents of Trinidad. As the court said in *Gulf Oil* v. *Gilbert, supra* at 511, 67 S. Ct. at 844,

> "to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statement of plaintiff's counsel that he will see to getting many of the witnesses to the trial * * *."

Most importantly, the inability to implead the pilot association here, which is not challenged by plaintiff, may seriously prejudice the defendant. The inability to implead other parties directly involved has been recognized as a factor to be weighed against retention of jurisdiction, see *Fitzgerald* v. *Texaco, supra* at 453, and this disadvantage to defendant is not cured by plaintiff's statement that it "believes" the Trinidadian pilot witness would respond to a third-party subpoena to appear for deposition in New York.

Finally, dismissal will not leave plaintiff without any remedy. Defendant has agreed to submit to the jurisdiction of the courts of Trinidad as a condition of dismissal of this suit; moreover, defendant has already commenced a suit in Trinidad which establishes its presence there for purposes of suit by plaintiff. Defendant has also offered a letter of guaranty that a Trinidadian judgment will be satisfied and agreed that this may be made a condition of the dismissal of this action.

These factors substantially outweigh plaintiff's choice of forum—even though plaintiff correctly argues that courts are more reluctant to deprive a plaintiff of that choice where dismissal would force an American citizen to seek redress in a foreign court. An American citizen does not, however, enjoy an absolute right to sue in an American court. *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F. 2d 633, 646 (2d Cir.) *cert. denied*, 352 U. S. 871, 77 S. Ct. 96, 1 L. Ed. 2d 76 (1956). Nor is plaintiff's New York residence dispositive. *Bernuth Lembcke Co.* v. *Siemens A. G.*, 1976 AMC 2175 (S. D. N. Y. 1976). In any

event, the result in this case is not unduly harsh since the action arose out of plaintiff's business activities in Trinidad, which is presumably not a forum unfamiliar to plaintiff.

For the foregoing reasons, defendant's motion to dismiss is granted, subject to reinstatement in the event that defendant shall fail to submit to jurisdiction in Trinidad with respect to the subject matter of this action and execute the guaranty of satisfaction of judgment described above.

SO ORDERED.